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Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY, PETITIONER,

vs.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

No. 556

FEDERAL POWER COMMISSION, PETITIONER,

vs.

MOBILE GAS SERVICE CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE No. 436 PETITION FOR CERTIORARI FILED NOV. 5, 1954

CASE No. 556 PETITION FOR CERTIORARI FILED JAN. 20, 1955

CERTIORARI GRANTED FEB. 28, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

[fol. 3] **Appendix to Petitioner's Brief**

(Filed April 14, 1954)

BEFORE THE FEDERAL POWER COMMISSION

JEROME K. KUYKENDALL, *Chairman*; CLAUDE L. DRAPER, NELSON LEE SMITH and SEABORN L. DIGBY, Commissioners.

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION

ORDER PERMITTING INTERVENTION, DENYING RELIEF REQUESTED, DISMISSING PETITION, AND TERMINATING PROCEEDINGS—December 7, 1953

On June 25, 1953, United Gas Pipe Line Company (United) filed First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its FPC Gas Tariff, Original Volume No. 1, in Docket No. G-2210. These revised sheets contained proposed increases in rates and charges to Mobile Gas Service Corporation (Mobile) for resale for industrial use only to the Ideal Cement Company (Ideal). United requested July 15, 1953 as the effective date of the proposed increase. However, by order issued July 10, 1953, the Commission denied the waiver of the thirty-day notice period provided in Section 4(d) of the Natural Gas Act, consolidated the proceeding with Dockets Nos. G-1142, G-1508, G-2019, and G-2074, and fixed July 20, 1953 as the date of hearing on the reasonableness of the proposed increased rates.

[fol. 4] On August 4, 1953, Mobile filed a petition *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142, *et al.*, seeking modification of the July 10, 1953 order. At that date, however, Mobile was not a party to the consolidated proceedings, and on August 7, 1953 Mobile

* NOTE: Numbers in brackets refer to the original page numbers of the copy.

amended its petition for modification to make a separate filing in the proceeding designated as Docket No. G-2227.[1]

In its petition in Docket No. G-2227, Mobile requested that:

(a) The Commission amend its order of July 10, 1953 in Docket Nos. G-1142, *et al.*, to reject United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39, which relate to the sale to Mobile of natural gas for resale for industrial use only to Ideal.

(b) If rejection be denied, the Commission modify the order of July 10, 1953 to direct a hearing to be held solely concerning the lawfulness of the filing of United's First Revised Sheet No. 40 and Second Revised Sheet No. 39.

[2] (c) The Commission issue an order amending paragraph (D) of its order of July 10, 1953 "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein."

(d) The Commission issue an order directing United that any increased rates collected from Mobile for resale to Ideal be subject to refund after hearing and determination (i) that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 is illegal, or (ii) that such revised sheets are unjust and unreasonable.

[fol. 5] Mobile alleges in its petition that, on June 28, 1946, it had entered into an agreement with United by which United agreed to accept 80 per cent of the proceeds of Mobile's resales to Ideal up to 41,667 Mcf per billing month and 90 per cent of the proceeds of all sales in excess of 41,667 Mcf per billing month even though Mobile's resale price should amount to less than 16 cents per Mcf. This agreement was filed with the Commission as Supplement No. 10

[1] All relief requested by Mobile in Docket No. G-2227 is relief which more appropriately should have been sought in the docket in which the complaint arose, Docket No. G-2210. This is, however, not material.

to Supplement No. 7 to United's Rate Schedule FPC No. 20. On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 4, in which, without altering the contract provisions, United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf.

In its petition Mobile claims that, in reliance upon this agreement with United, it made a 10-year contract with Ideal to supply that industrial user with natural gas at a rate of 12 cents per Mcf. United has, Mobile alleges, by its filing on June 24, 1953, in which it proposed to increase the rate to Mobile to 14.5 cents per Mcf unilaterally abrogated the United-Mobile contract. And, Mobile further alleges, its contract with Ideal cannot be altered.

On September 14, 1953, United filed a petition to intervene and answer in Docket No. G-2227. Thereafter, on September 29, 1953, Mobile filed a reply to United's petition to intervene and answer.

Turning first to Mobile's request that United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 be rejected, it is apparent that such relief must be denied. For clearly, Section 4(e) contemplates the filing of rate increases for sales for resale for industrial use only, otherwise the proviso prohibiting the suspension of such rate filings would be purposeless. And since United's filing of [fol. 6] its First Revised Sheet No. 40 and Second Revised Sheet No. 39 was made in conformity with the requirements of Section 4 of the Act and Part 154 of the Commission's Regulations thereunder [8 CFR, Part 154], it is, therefore, not subject to rejection. Indeed, a natural gas company may initiate a rate increase only pursuant to the provisions of Section 4.

In regard to Mobile's request that the "unreasonableness" of United's prior rate to Mobile should be determined in a separate hearing on this issue alone, it should be noted at this juncture that United's entire rate structure subject to the Commission's jurisdiction is presently under investigation and [3] a hearing has been commenced thereon in Docket Nos. G-1142, *et al.*, (the consolidated proceedings). No good reason appears why the issues in Docket No. G-2210 should be separated for hearing. In fact, the contrary appears, for as the Commission stated

in its order consolidating Docket No. G-2210 with Docket Nos. G-1142, *et al.*:

> "The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Docket Nos. G-1142, G-1508, G-2019, and G-2074."

Further practical considerations militate against separation of one of the common issues involved in consolidated Docket Nos. G-1142, *et al.*, for hearing in Docket No. G-2227. For, United has, pursuant to Commission order of July 10, 1953, already presented its direct case in support of its filing in Docket No. G-2210, including the rates to Mobile for resale to Ideal. It is obviously not in the public [fol. 7] interest for the Commission to hear the issues pertaining to the rates involved in United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 separately when issues common to all rates filed by United in Docket No. G-2210 impelled the Commission to consolidate the issues in one docket and further to consolidate that docket with others.[2]

As for Mobile's request that paragraph (D) of the order issued July 10, 1953, in Docket Nos. G-1142, *et al.*, be amended "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein," no amendment thereof is necessary. By paragraph (D) of said order the Commission merely refused to waive the 30-day notice period provided in Section 4(d) of the Act.

As clearly appears from paragraph (D) of said order and the full context of the order in which the Commission

---

[2] By paragraph (D) of its order issued July 10, 1953 in Docket Nos. G-1142, *et al.*, the Commission ordered: "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953."

found that the filed rates may be unjust, unreasonable, or otherwise unlawful and ordered a hearing concerning the lawfulness of those filed rates, no approval of the rate was involved. Also, as Section 154.23 of the Commission's Regulations under the Act [18 CFR 154.23] provides:

> "The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission."

Mobile also requests in its petition in Docket No. G-2227 that rates collected by United under First Revised Sheet No. 40 and Second Revised Sheet No. 39 filed in Docket No. G-2210 be collected subject to refund. But, clearly, [fol. 8] [4] the power to require refunds under Section 4(e) of the Act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take.

Upon consideration of all the facts and questions of law presented by Mobile and United in this docket, the Commission further finds:

(1) Participation of United in this proceeding may be in the public interest.

(2) It is appropriate and in the public interest that Mobile's petition in Docket No. G-2227 be dismissed, and the proceeding terminated.

The Commission orders:

(A) United be and the same is hereby permitted to become an intervener in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, That the participation of United shall be limited to matters affecting asserted rights and interests specifically set forth in the petition for leave to intervene; and *Provided, further*, That the admission of United shall not be construed as recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The separate requests of Mobile, more specifically set forth in its petition filed on August 4, 1953, as supplemented on August 7, 1953, in this proceeding and as summarized in the third paragraph [fol. 9] of the narrative part of this order, be and they are hereby denied.

(D) [sic] The petition of Mobile be and it is hereby dismissed and this proceeding be and it is hereby terminated.

By the Commission.

Leon M. Fuquay, Secretary.

Adopted: December 2, 1953

Issued: December 7, 1953

Revised First Page

BEFORE THE

FEDERAL POWER COMMISSION

WASHINGTON, D. C.

In the Matters of UNITED GAS PIPE LINE COMPANY

[fol. 10] MOBILE'S PETITION AS REVISED TO HAVE COMMISSION REJECT UNITED'S FILING*

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET NO. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET NO. 40 AND SECOND REVISED SHEET NO. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME NO. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

Mobile Gas Service Corporation (herein called "Mobile"), herewith respectfully petitions the Federal Power [fol. 11] Commission, pursuant to the provisions of the Natural Gas Act and particularly Sections 5 (a) and 16 thereof and pursuant to the Rules of Practice and Procedure, Section 1.7 thereof, and respectfully requests (A) that the Commission modify and amend its order of July 10, 1953, in the matter of United Gas Pipe Line Company, Docket No.

*This document constitutes Mobile's petition as originally filed, but with the revisions which were made by Mobile's amending petition filed August 7, 1953. That amending petition is reprinted, *infra*, as are the original pages of this petition which it revised.

G-2210, so as to reject the [2] First Revised Sheet No. 40 and Second Revised Sheet No. 39 to FPC Gas Tariff, Original Volume No. 1, of United Gas Pipe Line Company (herein called "United") in so far as said Sheets apply to sales to Mobile for resale to Ideal Cement Company (herein called "Ideal") on the grounds that the said Revised Sheets cannot properly be filed under Section 4 of the Natural Gas Act because said Revised Sheets seek to effect a unilateral increase in existing rates for natural gas fixed by a firm contract between United and Mobile, which contract rates cannot be changed in the absence of a prior determination, after proper hearing, that the said existing contract rates are unreasonable as being against the public interest; and (B) that if the foregoing relief be denied the said order of the Commission issued July 10, 1953 be amended and modified to provide solely that a hearing be held as to the lawfulness of the filing by United of said Revised Sheets Nos. 39 and 40 in the absence of a prior investigation and determination of the unreasonableness of the existing contract, and (C) that the Commission issue forthwith an order substituting a revised paragraph (D) for existing paragraph (D) of its order issued July 10, 1953 so that it will be clear that the Order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased [fol. 12] rate specified therein, and (D) that the Commission forthwith issue an order directing that any increased rates which United may seek to collect from Mobile for resales to Ideal shall be collected subject to refund after a hearing and (i) a determination as to the illegality of United's filing of said Revised Sheets Nos. 39 and 40 or (ii) a determination that said Revised Sheets are unjust and unreasonable.

[3] In support thereof, Mobile alleges as follows:

1. Mobile is a corporation organized and existing as a public utility under the laws of the State of Alabama. It engages in the business of purchasing, distributing and selling natural gas at retail in the City of Mobile, Alabama and in the surrounding communities and area.

2. The names and addresses of all persons upon whom it is requested that copies of any papers, notices, motions,

orders or other documents in this proceeding should be served are as follows:

Maurice White, President
Mobile Gas Service Corporation
182 St. Francis Street
Mobile, Alabama

Sam M. Johnston, Attorney
P. O. Box 550
Mobile 4, Alabama

Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, N. Y.

3. Mobile purchases its entire supply of natural gas from United Gas Pipe Line Company, on information and belief a Delaware corporation. Mobile's purchases from United are made pursuant to a contract entered into be- [fol. 13] tween Mobile and United Gas Public Service Company, a predecessor to United, on or about January 1, 1936 and as modified by subsequent agreements between Mobile and United entered into on or about October 17, 1941 and July 30, 1946, respectively. These contracts were filed with this Commission as United's Gas Rate Schedule FPC No. 20 and Supplements Nos. 7 and 9 thereto, respectively and to which reference is hereby made and which shall be deemed incorporated herein by reference.

[4] 4. Pursuant to the terms of the 1936 contract, as modified by the contracts entered into on October 17, 1941 and July 30, 1946, it was agreed that United should be paid for gas sold to Mobile for resale to large industrial customers at percentages of the proceeds received by Mobile for such resales, but that in any event United should receive not less than 16 cents per MCF of gas sold to such industrial customers unless United consented in writing to a lesser amount.

5. On or about June 28, 1946 Mobile entered into a contract with Ideal Cement Company (hereinafter called "Ideal") under which Mobile agreed to supply Ideal's natural gas requirements up to not exceeding 8,000 MCF per day for a period of ten years, at the option of Ideal, at either the so called Rate Schedule "B" or the so-called

Rate Schedule SR-M #1, both of which Rate Schedules were set forth in the said contract. Ideal elected Rate Schedule SR-M #1.

6. Mobile advised United that Mobile was entering into the aforesaid contract with Ideal for a period of ten years and of the alternative rates provided therein to be charged Ideal, and requested United to consent and agree to accept [fol. 14] the percentages of the proceeds of Mobile's sales of natural gas to Ideal provided in the supplemental agreement between United and Mobile of July 30, 1946, namely 80% of the proceeds of sales up to 41,667 MCF per billing month and 90% of the proceeds of all sales in Excess of 41,667 MCF per billing month, even though such percentages resulted in the payment to United of less than 16 cents per MCF for natural gas sold by it to Mobile for resale to Ideal. United consented and agreed to the aforesaid rates to be charged Ideal by Mobile and agreed to accept

Revised fifth page

[5] said percentages of Mobile's proceeds of sales of natural gas to Ideal. Such consent and agreement by United was filed with the Federal Power Commission as Supplement No. 10 to United's Rate Schedule FPC No. 20, to which reference is hereby made and which shall be deemed incorporated herein by reference. Mobile entered into said contract with Ideal of June 28, 1946 in reliance upon the aforesaid consent and agreement by United.

7. Without objection of United or Mobile, Ideal has been using natural gas in quantities in excess of 8,000 MCF per single day of twenty four hours, the maximum amount which Mobile is required under its said contract with Ideal to deliver to Ideal in any such period of time, and Ideal has paid therefore at the SR-M #1 rate.

8. On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile [fol. 15] for resale to Ideal, and specified that the rate for such sales was 10.7 per MCF for all natural gas sold by

United to Mobile for resale to Ideal. Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate. As a practical matter, the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal.

9. On or about June 24, 1953 United filed with this Commission various schedules of proposed increases in its rates and charges for certain [6] town-border sales, which schedules included Second Revised Sheet No. 39 and First Revised Sheet No. 40 to United's FPC Gas Tariff, Original Volume No. 1. These sheets constituted a proposed increase in the rates and charges made to Mobile for gas sold to it for resale to large industrial customers including Mobile's sales to Ideal. The rate specified in the said Revised Sheets is 14.5¢ per MCF for all gas delivered, representing an increase in the rate of Mobile of 3.8 cents, so that Mobile now is asked to pay more to United for gas than the price at which it sells that gas to Ideal.

10. On July 10, 1953 the Commission issued an order in the proceeding in Docket No. G-2210 directing that a hearing be held as to the lawfulness, among other proposed rate increases, of the said Revised Sheets Nos. 39 and 40 affecting the service to Mobile for Ideal. This the Commission had a right to do. However, the Commission went further, and in said order provided in part as follows:

[fol. 16] "(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953." (Underlining supplied.)

11. On or about July 16, 1953, Mobile submitted for filing in the above entitled consolidated proceeding its petition for intervention.

I

The Commission Should Reject the Filing by United of Revised Sheets Nos. 39 and 40 In So Far As They Relate to Mobile's Sales to Ideal.

United's action in filing its proposed increase in its rates to Mobile for gas sold Mobile for resale to Ideal is a

unilateral effort [7] on United's part to abrogate or modify its contract with Mobile.

Mobile's contract with Ideal to supply the latter with this gas at 12 cents per MCF for the ten year term of the contract was entered into with the knowledge and consent of United and in reliance upon United's express agreement, given pursuant to its contract with Mobile, to accept the aforesaid percentages of the proceeds of Mobile's resales to Ideal, even though such percentages amounted to less than 16 cents per MCF.

It is Mobile's position that United's agreement to accept 80% and 90% of the 12 cents per MCF rate specified in Mobile's contract with Ideal, cannot be modified or abrogated by United through any unilateral action taken by it pursuant to Section 4 of the Natural Gas Act. Mobile contends that in the absence of its agreement to an in- [fol. 17] crease in the rates at which United agreed to supply gas for resale to Ideal, the only proper procedure whereby United and the Commission may increase such rates is after a hearing and a determination that the said existing contract between United and Mobile is unjust and unreasonable.

The impropriety in United's unilateral attempt to abrogate its agreement with Mobile is particularly apparent here where, by reason of the proviso contained in Section 4 (e) of the Natural Gas Act, the increased rates sought by United could not be suspended and have therefore been permitted to become effective without even affording Mobile an opportunity to have their justness and reasonableness determined by hearing before this Commission. Rather, Mobile has been deprived of its rights and of its property without either opportunity to be heard as to the reasonableness of the increased rates or without any obligation being placed upon United to demonstrate that the existing rates fixed by its agreement with Mobile are unreasonable.

[8] It is respectfully submitted that the correctness of Mobile's position is supported by the decision of the Supreme Court of the United States in *Wichita Railroad & Light Co. v. The Public Utilities Commission of the State of Kansas*, 260 U.S. 48 and by the decision in *Attleboro*

Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. 895, and that United's existing agreement with Mobile with respect to resales to Ideal can only be altered after a proper hearing and determination that it is unreasonable and is injurious to the public interest.

Moreover, Mobile submits that even if the Commission [fol. 18] disagrees with the foregoing contentions, it should nevertheless, in the exercise of its discretion, refuse to permit its procedures to be utilized by United for the unilateral abrogation of a firm and binding agreement, entered into in good faith and at arms length, without first requiring that United demonstrate that its agreement to serve Mobile for resale to Ideal at 10.7 cents per MCF is unjust and unreasonable because it is injurious to the public interest, and Mobile respectfully urges that such an exercise of the Commission's discretion is particularly appropriate in the present proceeding where the suspension provisions of Section 4 (e) are not available.

II

The Commission Should Forthwith Issue an Order Substituting a Revised Paragraph (D) for Existing Paragraph (D) of its Order Issued July 10, 1953.

Mobile maintains that United cannot unilaterally abrogate or modify its agreement with Mobile with respect to the rates for natural gas sold by United to Mobile for resale to Ideal. Filing a proposed revision of the applicable rate schedule purports to do just this. [9] Accordingly, the Commission should not in its Order of July 10, 1953 have stated that such filing was permitted to become effective July 25, 1953.

In the Commission's opinion accompanying the said order of July 10, 1953 the Commission stated in part:

> "From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. * * * 40 *, * * *, Second Revised Sheets Nos. * * * 39 as tendered for filing [fol. 19] on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful."

In its said order the Commission found it necessary and proper in the public interest that United's proposed increased rates be suspended and ordered that a hearing as to the lawfulness of all of such proposed increased rates and charges be had. However, by reason of the proviso contained in Section 4(e) of the Gas Act, the Commission did not suspend Revised Sheets Nos. 39 and 40.

Mobile submits that in the light of the Commission's suspension of United's other proposed increased rates and the possibility that all of such proposed increases, including Revised Sheets Nos. 39 and 40 may be "unjust or unreasonable or otherwise unlawful", it was improper to order that such Revised Sheets be permitted to become effective. Mobile submits that paragraph (D) of such order with respect to Revised Sheets Nos. 39 and 40 cannot and should not be permitted to stand as separate affirmative approval by this Commission of said Revised Sheets, and that said paragraph (D) is not supported by the Findings.

It is Mobile's belief that the Commission intended by paragraph (D) above quoted to do no more than deny United's request that the revised sheets therein mentioned should be permitted to become effective prior to thirty days from the date of actual filing thereof. If this is the fact [10] then there was no need for the Commission to state that "the same are hereby permitted to become effective on July 25, 1953."

Mobile therefore submits that a further order should [Fol. 20] forthwith be issued by the Commission deleting from the Commission's said order of July 10, 1953 the above quoted paragraph (D) of said order and substituting in lieu thereof a paragraph (D) reading substantially as follows:

> "(D) The Commission hereby denies the request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be permitted to become effective on July 15, 1953."

The Commission's attention is directed to Sec. 154.21 of its General Rules and Regulations which provides:

> "The Effective Tariff of a natural gas company shall be the Tariff filed pursuant to the requirements

of this Part, *and permitted by the Commission to become effective. No natural gas company shall directly or indirectly demand, charge, or collect any rate for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classification, practices, rules or regulations different from those prescribed in its effective Tariff, and executed service agreements on file with the Commission, unless otherwise specifically provided by Order of the Commission.*" (Italics supplied.)

The Commission's attention is also directed to Paragraph D of the Commission Order issued July 10, 1953 which reads:

"(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 *be and the same are hereby permitted to become effective on July 25, 1953.*" (Italics supplied.)

Should the Commission not reject the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 of [fol. 21] United's FPC Gas Tariff Original Volume I, it would appear in view of the above quoted Section 154.21 of the Commission's Rules and Regulations and the above quoted Paragraph D of the Commission's Order of July 10, 1953 that United will [11] not only have the right, but be under obligation, to charge Mobile for natural gas sold Mobile for resale to Ideal at the rate of 14.5 cents per MCF, unless this Commission modifies its aforesaid Order of July 10, 1953 to eliminate therefrom its permission to United as set forth in the above quoted paragraph D to make effective July 25, 1953 First Revised Sheet No. 40 and Second Revised Sheet No. 39.

Mobile further contends that the Commission in such further order should declare and make it clear that although by virtue of the provisions in Section 4(e) of the Natural Gas Act the Commission cannot suspend rates for sales of natural gas for resale for industrial use only, that nevertheless Section 154.24 of the Commission's Rules

and Regulations provides: "Acceptance for filing of any Tariff, contract or part thereof is not to be considered as approval by the Commission", and that accordingly, the Commission does not recognize the legal right of United to charge the increased rates set forth in said First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 until the Commission has had an opportunity to hear United and any protestants and to investigate and determine the reasonableness and legality thereof; and that the Commission does not sanction the filing of revised sheets as a device to abrogate or modify the terms of existing contracts affected thereby unless and until the Commission determines that public interest requires and justifies the abrogation or modification of such contracts.

[fol. 22] III.

The Commission Should Order That United Should Save Mobile Harmless From Rates Later Determined to Be Illegal.

In the event that the Commission shall deny Mobile's request that United's filing of its Revised Sheets Nos. 39 and 40 be rejected in [12] so far as they relate to Mobile's resale to Ideal, Mobile may be subjected to irreparable damage unless the Commission affords it other relief. If the Commission refuses to reject United's filing or if having refused such rejection it orders a hearing solely as to the lawfulness of United's filing, Mobile may be obligated to pay United the increased rate set forth in said Revised Sheets for gas sold by it to Ideal pending a determination by the Commission as to the propriety of United's unilateral filing of such increased rates in spite of the existence of its firm agreement with Mobile respecting Mobile's purchases of gas for resale to Ideal.

Mobile submits that it would be placed in a clearly unjust and unfair position as a result of the possibility of its being obligated to pay United increased rates during an interim period pending determination as to the lawfulness of United's unilateral action and respectfully submits that it will suffer irreparable damages and injury if this Commission does not protect its rights. Consequently, Mobile requests that in the event the Commission refuses

to reject United's filing of Revised Sheets Nos. 39 and 40, it forthwith issue an order directing, in the event Mobile is obligated to pay United increased rates for gas purchased for resale to Ideal, such increased rates collected by United shall be subject to a refund to Mobile in the [fol. 23] event that they shall ultimately be determined to be illegal.

In the ordinary case of proposed increased rates the rate payer has the dual protection of a five months suspension of the increase and of a bond if the rates thereafter go into effect pending a Commission decision as to their lawfulness. Here Mobile is deprived of the suspension safe-guard and it is all the more appropriate, therefore, that it be afforded protection as aforesaid.

[13] Mobile respectfully submits that under Sections 16 and 20 of the Natural Gas Act the Commission has authority to afford Mobile such necessary protection, and it further submits that this protection is essential in this case where the increased rates which United may be entitled to collect from Mobile "may be unjust or unreasonable or otherwise unlawful" and where the increased rates have not been suspended.

WHEREFORE, your petitioner respectfully prays

(1) That the Commission forthwith enter an order amending and modifying its order of July 10, 1953 so as to provide that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 to United's FPC Gas Tariff, Original Volume No. 1, in so far as they apply to service to Mobile for resale to Ideal, be rejected; and further prays that, in the event the foregoing relief be denied,

(2) the Commission enter an order amending and modifying its order of July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said Revised Sheets Nos. 39 and 40; and

[fol. 24] That the Commission forthwith issue an order substituting for paragraph (D) of its order of July 10, 1953 a new paragraph (D) reading as follows:

"(D) The request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets

Nos. 31 and 39 be permitted to become effective on July 15, 1954 is denied."

(4) Further prays that the Commission forthwith enter an order directing that any increased rates which United may be entitled to collect from Mobile for sales to Mobile for resale to Ideal shall [14] only be collected subject to refund to Mobile in the event and to the extent that said increased rates shall be determined to be illegal; and

(5) For such other and further relief as to the Commission may seem just in the premises.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for petitioner Mobile Gas Service Corporation.

William C. Chanler, Arthur E. Palmer, Jr., Of Counsel.

[fol. 25] Johnston, McCall & Johnston, P. O. Box 550, Mobile, Alabama; Samuel M. Johnston, Dan T. McCall, Jr., Of Counsel.

[Verified August 3, 1953 by Dan T. McCall, Jr., attorney for Mobile.]

[Certificate of Service dated August 4, 1953 by Dan T. McCall, Jr.]

[fol. 26] BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, G-2220

In the Matters of UNITED GAS PIPE LINE COMPANY

MOBILE'S PETITION AMENDING ITS INITIAL PETITION*

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET No. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET No. 40 AND SECOND REVISED SHEET No. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME No. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

On August 4, 1953, Mobile Gas Service Corporation (herein called "Mobile") filed with the Federal Power [fols. 27-29] Commission its Petition in the above entitled proceeding captioned as aforesaid. For the reasons (1) that Mobile in its letter transmitting said Petition to the Commission for filing requested that the Commission assign a separate Docket number to said Petition and (2) that Mobile at the time of said filing had not been recognized by the Commission [2] as an intervener in the above entitled proceeding and should not have been described therein as an intervener, Mobile now desires to amend its said Petition filed on August 4, 1953 by substituting a new first page for

* This amending petition is reprinted in the form in which it was filed. The original petition, as revised, is reprinted, *supra*, and the pages of the original petition which were revised are reprinted, *infra*.

the first page of Petition to delete the docket numbers in the caption hereof in order that a separate docket number may be assigned thereto and to omit the reference to Mobile as an intervener by deleting the phrase: "intervener in the above entitled proceeding". Mobile also desires to substitute a new fifth page for page five of its said Petition filed on August 4, 1953 for the purpose of amending Section 5 of said Petition.

WHEREFORE, your Petitioner respectfully prays that the Commission will substitute for the first page and fifth page respectively of Mobile's Petition filed with this Commission on August 4, 1953 the revised first page and revised fifth page hereto annexed, and assign a separate docket number to its said Petition filed on August 4, 1953 as hereby amended.

Respectfully submitted, Mobile Gas Service Corporation, by (S.) E. M. Sampson, Assistant Secretary.

[fol. 30] BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matters of UNITED GAS PIPE LINE COMPANY,

ORIGINAL FIRST PAGE OF MOBILE'S PETITION WHICH WAS CHANGED BY MOBILE'S AMENDING PETITION

PETITION BY MOBILE GAS SERVICE CORPORATION (A) TO HAVE THE COMMISSION MODIFY AND AMEND ITS ORDER OF JULY 10, 1953 IN THE PROCEEDING IN DOCKET No. G-2210 SO AS TO REJECT THE FILING BY UNITED GAS PIPE LINE COMPANY OF ITS FIRST REVISED SHEET No. 40 AND SECOND REVISED SHEET No. 39 TO ITS FPC GAS TARIFF, ORIGINAL VOLUME No. 1, IN SO FAR AS SAID SHEETS INCREASED THE RATES FOR SALES TO MOBILE FOR RESALE TO IDEAL CEMENT COMPANY; AND (B) IF SUCH RELIEF BE DENIED, TO MODIFY AND AMEND SAID ORDER TO DIRECT THAT A HEARING BE HELD AS TO THE LAWFULNESS OF THE FILING OF SAID REVISED SHEETS; AND (C) TO MODIFY AND AMEND SAID ORDER SO AS TO ELIMINATE ANY STATEMENT OF APPROVAL OF SAID REVISED SHEETS BY THE COMMISSION; AND (D) TO ISSUE AN ORDER DIRECTING THAT ANY INCREASED RATES COLLECTED BY UNITED FROM MOBILE PURSUANT TO SAID REVISED SHEETS SHALL BE SUBJECT TO REFUND

Mobile Gas Service Corporation (herein called "Mobile"), intervenor in the above-entitled proceeding, herewith respectfully petitions the Federal Power Commission, pursuant to the provisions of the Natural Gas Act and particularly Sections 5 (a) and 16 thereof and pursuant to the Rules of Practice and Procedure, Section 1.7 thereof, and respectfully requests (A) that the Commission modify and amend its order of July 10, 1953 in Docket No. G-2210 in the above-entitled proceeding so as to reject the

[fol. 31] ORIGINAL FIFTH PAGE OF MOBILE'S PETITION WHICH WAS CHANGED BY MOBILE'S AMENDING PETITION

[5] said percentages of Mobile's proceeds of sales of natural gas to Ideal. Such consent and agreement by United was filed with the Federal Power Commission as Supple-

ment No. 10 to United's Rate Schedule FPC No. 20, to which reference is hereby made and which shall be deemed incorporated herein by reference. Mobile entered into said contract with Ideal of June 28, 1946 in reliance upon the aforesaid consent and agreement by United.

7. With the knowledge and approval of United, Mobile has been supplying natural gas to Ideal in quantities up to approximately 12,000 MCF per day all at the SR-M #1 rate, although the contract between Mobile and Ideal requires Mobile to supply Ideal's requirements up to only 8,000 MCF per day.

8. On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile for resale to Ideal, and specified that the rate for such sales was 10.7 cents per MCF for all natural gas sold by United to Mobile for resale to Ideal. Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate. As a practical matter the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal.

9. On or about June 24, 1953 United filed with this Commission various schedules of proposed increases in its rates and charges for certain

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[fol. 32] BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION

UNITED'S PETITION OF INTERVENTION AND ANSWER

Petition of Intervention and Answer of United Gas Pipe Company

United Gas Pipe Line Company (United) herewith respectfully moves the Federal Power Commission (Commission) pursuant to the provisions of the Natural Gas

Act and to the Rules of Practice and Procedure of this Commission, issued pursuant thereto, for leave to intervene in this proceeding in opposition to the position of Mobile Gas Service Corporation (Mobile) and in support of the validity and binding effectiveness of the Order of this Commission heretofore issued on July 10, 1953 in Docket No. G-2210 before this Commission, permitting certain rates as set out in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 as well as other proposed rates to become effective on July 25, 1953 pending the hearing and decision of the proceedings in said docket. United shows that it is a party in interest to the matters set out herein by Mobile and will be directly affected by the decision of the rulings of the Commission herein, and since the issues sought to be presented involve the duties and obligations of United under the Natural Gas Act to this Commission, it is entitled to appear and present [2] its position for the consideration of this Commission.

[fol. 33] I

In answer to the petition of Mobile, United alleges as follows:

(1). United is a Natural Gas Company subject to the jurisdiction of the Commission under the Natural Gas Act and the matters and issues sought to be raised herein by Mobile involve its rights, powers and duty to the Commission and the Commission's power, authority and jurisdiction of matters confided to the jurisdiction of the Commission by the Natural Gas Act.

(2) The names and addresses of all persons upon whom it is requested that copies of any papers, notices, motions, orders or other documents in this proceeding should be served are as follows:

Mr. Winston W. Brown, Assistant Secretary
United Gas Pipe Line Company
1525 Fairfield Avenue
Shreveport, Louisiana

II

On or about January 1, 1936, United Gas Public Service Company, a predecessor of United, contracted with Mobile respecting the sale of natural gas to Mobile, which contract, in Article XV, among other things, provided: "all of the obligations of the parties hereunder shall be subject to the valid orders of all governmental bodies, both Federal and State, having lawful jurisdiction in the premises". United has succeeded to the rights, powers and obligations of United Gas Public Service Company in said contract, which has from time to time been amended and supplemented by the parties, all of which have, in [3] accordance with the rules and regulations of this Commission, been filed with this Commission, and by this Commission permitted to become effective, including a supplement or amendatory agreement of date June 28, 1946, which was [fol. 34] filed with this Commission as Supplement No. 10 to Supplement No. 7 to United's Gas Rate Schedule FPC No. 20, the signature of United to the last supplement being expressly conditioned upon approval of this Commission and this Commission permitted the same to become effective.

III

In accordance with the provisions and requirements of the Rules and Regulations of this Commission, United filed on or about the 3rd day of July, 1952, its FPC Gas Tariff converting all contracts and contractual agreements for service and rates into tariffs as provided by the Rules and Regulations of the Commission, one of such contracts so converted into tariff form was the contract and all supplements and amendments thereto described in Paragraph II hereof. Said conversion tariff, together with the service agreement supporting the same, superseded all of the terms and provisions of said original contract and supplements thereto, except those provisions expressly retained as permitted by the Rules and Regulations of this Commission and thereby became the only lawful basis for service and the rates and charges to be made therefor lawfully chargeable by United to Mobile for the service and sales covered by said tariff.

IV

On or about June 24, 1953, United filed with this Commission [4] application for increase of rates and charges covering certain town border sales and certain sales for resale to large industrial consumers, which would be inclusive of the gas alleged by Mobile to be sold by it to Ideal Cement Company. This application was accepted for filing by the Commission and docketed as Docket G-2210 by the order of July 10, 1953, which, in accordance with the provisions of the Natural Gas Act, permitted the tariffs for resale for industrial use only, including that to [fol. 35] Mobile for its resale to Ideal, to become effective on July 25, 1953, "pending such hearing and decision thereon", consolidating said Docket G-2210 with Dockets G-1142, G-1508, G-2019 and G-2074, then pending and in course of hearing, and set said application for immediate hearing to begin in the Hearing Rooms of this Commission in Washington, D. C. on Monday, July 20, 1953. In accordance with the Rules and Regulations of this Commission, United gave notice to Mobile of such filing and the rates proposed and applied for and in addition thereto, Mobile was advised by the Commission, in accordance with the Commission's custom, of such filing and its comments requested; and thereafter, Mobile duly filed an application to intervene in said Docket G-2210 which has been granted by the Commission and Mobile is a party to said proceeding after due notice as required by law fully authorized and empowered to present in the record of said proceeding, any evidence, if any, which it may have touching upon the right of United in said Docket G-2210 to have said proposed rates finally established, and fully authorized and empowered to present to this Commission any evidence, if any, which it [5] may have bearing upon the issue whether such rates are just and reasonable and to be finally authorized by this Commission.

V

Instead of availing itself of its rights as an intervenor in accordance with the order of this Commission, Mobile has filed this proceeding in which it contends:

(A) That a contract for a rate for a fixed term is superior to and beyond the reach of Section 4(e) of the Natural Gas Act;

(B) That such contract presents a rate which may not be interfered with except upon a proceeding under Section 5(a);

[fol. 36] (C) That such contract prevents this Commission and United from exercising the duties and obligations granted and imposed upon them by the Natural Gas Act with respect to the provisions of Section 4 of the Natural Gas Act; and

(D) That such contract requires this Commission, contrary to the requirements of the Natural Gas Act, to reject without hearing an application lawfully filed under Section 4(e) of the Act.

VI

United shows that the positions and contentions of Mobile are without force and effect and are wholly without merit for the following [6] reasons, to-wit:

(1) No private contract may be validly made or enforced or relied upon which purports, or is contended, to deprive, restrict, impair or destroy any right or duty of a natural gas company or this Commission as required by the terms of the Natural Gas Act and any and all contractual provisions at variance therewith, are wholly void and unenforceable.

(2) Only just and reasonable rates may be charged by United in respect of service subject to the jurisdiction of this Commission, and United as a natural gas company subject to the jurisdiction of this Commission, has the duty under that Act, including Section 4(e), to propose for Commission approval or acceptance, rates or changes in rates which are just and reasonable and not discriminatory; and the Commission itself, or, under complaint of any of those persons specified in Section 5(a) of the Act, has the power

to investigate and determine the reasonableness of rates; and such powers, rights and duties of natural gas companies, their contractees, and the Commission cannot be changed, altered, restricted, or destroyed by any contract or contractual provision between the natural gas company [fol. 37] and any of its customers so that United and Mobile, as a matter of law, were not and are not now free validly to contract in derogation of any of the terms and provisions of the Natural Gas Act or the exercise of rights and duties permitted and required by that Act either upon United or this Commission.

(3) All of the provisions of the contract of January 1, 1936 and all amendments and supplements thereto, the conversion tariff [7] filed by United and the application docketed in Docket G-2210, are as to United and Mobile wholly and in all things subject to the Commission's powers and duties under the Act and any contractual provision therein which would prevent or restrict or tend to prevent or restrict the free exercise and performance of the duties and powers given to and imposed upon United as a natural gas company and this Commission as the administrator of the Act, as a matter of law, are inoperative, unenforceable and invalid.

(4) Rate making and regulation by the Commission is a legislative function under the Act and in nowise subject to any private contractual obligation and the respective rights, duties and powers under the Act including Sections 4 and 5, are in all respects superior to contractual provisions.

(5) Any contractual provision approved or merely accepted by this Commission or a rate fixed or merely accepted by this Commission are subject always to the rights and duties of United as a natural gas company and to this Commission under the Act, including Sections 4 and 5 to propose and fix just and reasonable rates. The effect of supporting or adjudging the contentions of Mobile as correct would be to annul and cancel the applicability of Section 4(e) of the Act to United, which would be against public policy, for one subject to regulation may not impair, [fol. 38] interfere with or defeat such regulation by a contractual provision which would have the effect to rescind and annul a statute or any part thereof and this result

would follow, if the [8] contract between Mobile and United prevents, as Mobile contends, United from relying upon or complying with Section 4(e). Emasculation of Section 4 by reason of a contractual provision would effectively destroy any right or power to increase a rate or charge, for Section 4 is the only method provided by the Act for increase of pending rates or charges, and Section 5(a), while giving the Commission power to determine the just and reasonable rate (or charge) * * * to be thereafter observed or enforced, expressly denies power to the Commission to increase a rate by the proviso "That the Commission shall have no power to order any increase in *any* rate * * * unless such increase is in accordance with a *new* schedule filed by such natural gas company." (Italics supplied) Thus the Act contemplates and requires that any increase of a rate can only be accomplished by a filing act of the natural gas company which necessarily is a unilateral act performable only by it under Section 4. Upon such filing, the Commission under Section 4(d) is then authorized to permit the same to become effective without hearing, or by Section 4(e) to require a hearing "concerning the lawfulness of such rate" proposed, nor is the exercise of such duties and power by the Commission conditioned by the Act upon a prior hearing or completed proceeding under Section 5(a) of the Act.

(6) A filed rate, whether fixed or merely accepted by the Commission, is the only lawful rate, and thus the rate filed in Docket G-2210 and permitted by the Commission to become effective pending hearing is the only lawful rate between United and Mobile binding equally on both.

[9] (7) The order of July 10, 1953 is a valid and binding order upon Mobile and is the only effective rate which [fol. 39] United can lawfully charge Mobile and which Mobile can lawfully pay pending the hearing upon the same in Docket G-2210 and is therefore conclusive upon Mobile and cannot be collaterally attacked by Mobile in this independent proceeding. An increase in rates having been lawfully proposed and applied for by United under the provisions of Section 4(e) could not be properly or validly rejected by the Commission as Mobile now seeks without a hearing, and, since the Act expressly forbids the Commis-

sion to suspend an application for increase of a sale of natural gas for resale for industrial use only, the Commission by adopting and issuing the order of July 10, 1953 issued the only order which it could properly and lawfully issue and one wholly and strictly in accordance with the duties and obligations imposed upon it by the provisions of the Act.

(8). Mobile's suggestion that the Commission should now attach conditions to the order of July 10, such as a condition for refunding should the Commission enter in Docket G-2210 an order which would not approve in full such proposed rates, is equally without merit and force for the following reasons:

Section 4(e) of the Act gives to the Commission the discretion to suspend the operation of certain types of rates and further provides that if the Commission in its discretion does suspend such rates, it shall have the further discretion, upon the same becoming effective prior to completion of the hearing, to require a bond upon a condition [10] of refund, whereas such powers and discretions with reference to gas sold for resale for industrial use only are expressly prohibited and denied to the Commission by the proviso of said Section

> "That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only"

[fol. 40] so that the attaching of any such conditions to the order of July 10, 1953, in respect of such industrial rates, would be contrary to the express provisions of Section 4(e) and would constitute the exercise of powers expressly denied to the Commission. Non-suspendable rates, charges, classifications or service for the sale of natural gas for resale for industrial use only in accordance with the provisions of Section 4(e) and the intent thereof are comparable to reparations which the Commission does not have the power to grant. Unless and until the Congress should amend the Natural Gas Act and give to this Commission powers to suspend or otherwise attach conditions such as Mobile suggests to rates, charges, classifications or service

"for the sale of natural gas for resale for industrial use only", no such right exists and the Commission would be without valid power or authority to attach such conditions.

(9) Mobile's petition on its face shows, and the Commission will take judicial knowledge of the fact, that the requirements of due process have been fully complied with in that Mobile has been notified [11] as required by the Rules and Regulations of this Commission of the pendency of the matters affecting it and involved in Docket G-2210, has been permitted to intervene therein, and thus has ample opportunity to offer there such evidence, if any, which it may have bearing upon the ultimate issue to be there decided that such rates proposed by United are just and reasonable. Mobile is thus not deprived of any legal rights or property, but is vouchsafed and guaranteed the exercise by such means of all rights which it has or may claim for consideration of this Commission of its contention with respect to the decision which this Commission will make up the application in said Docket G-2210, which is still pending, the hearing being in recess.

[fol. 41] VII

By reason of all of the matters set out in the foregoing, United says that Mobile being a party to the proceedings in Docket G-2210 and thus possessed of full opportunity and right to present evidence on the issues therein, this proceeding should be denied and dismissed, or in the alternative, treated as a supplement to Mobile's intervention in said Docket G-2210 insofar as the same would permit Mobile to participate therein and offer evidence upon the issue as to the justness and reasonableness of the rates proposed to be applicable to it, but that all of its contentions herein presented constituting an attack upon the valid and subsisting order of this Commission dated July 10, 1953 and all of the issues sought to be tendered here of superiority of a claimed contractual provision to [12] the provisions and requirements of the Natural Gas Act and of the Rules and Regulations of this Commission, or for rejection or attaching of conditions to the order of July 10, 1953, should be forthwith and in all things denied, rejected and dismissed.

Wherefore, premises considered, United prays that the petition of Mobile herein be in all things denied or dismissed, or in the alternative that so much thereof as is consistent with the petition of intervention of Mobile in Docket G-2210 be considered as a supplement to the petition [fol. 42] of intervention and filed in that docket now in course of hearing to which Mobile is a party and for such other orders as the Commission may deem just and proper.

United Gas Pipe Company, Original Signed. By: Wilbert O. Crain, General Counsel.

Counsel for United Gas Pipe Line Company.

Wilbert O. Crain, General Counsel, Geo. D. Fiser, Address: United Gas Building, 1525 Fairfield Avenue, Shreveport, Louisiana. Thomas Fletcher, Address: Neils Esperson Building, Houston, Texas. Vernon Woods, C. Huffman Lewis, Address: 1525 Slattery Building, Shreveport, Louisiana.

[Verified September 11, 1953 by Wilbert O. Crain, General Counsel of United Gas Pipe Line Company.]

[Certificate of Service dated September 14, 1953 by Wilbert O. Crain.]

[fol. 43] Before the Federal Power Commission

Docket No. G-2227

In the Matter of Mobile Gas Service Corporation

Reply of Mobile Gas Service Corporation to Petition of Intervention and Answer of United Gas Pipe Line Company

Comes now Mobile Gas Service Corporation (herein called "Mobile") and herewith respectfully replies, pursuant to the provisions of the Natural Gas Act and to the Rules of Practice and Procedure of the Federal Power Commission (herein called "Commission"), including Sections 1.9(f) and 1.20(b), to the Petition of Intervention and Answer of

United Gas Pipe Line Company (herein called "United"), and in support thereof respectfully alleges the following:

I

Mobile has no Objection to United's Intervention

Mobile has no objection to the intervention of United in the above entitled proceeding.

[fol. 14] II

Special Contracts Between Utilities Are Binding as to Rates Until Such Rates Are Found to Be Unreasonable

In its Answer United sets forth its opposition to the Petition of Mobile wherein Mobile requested the Commission to reject the filing by United of its First Revised Sheets No. 40 and Second Revised Sheets No. 39 to its F. P. C. Gas Tariff, Original Volume No. 1.

[2] United has misconstrued the nature of Mobile's position. United argues that Mobile seeks to place a private contract between utilities above the provisions of the Natural Gas Act and thereby to limit the authority of the Federal Power Commission. In fact, Mobile's position is quite the contrary. As set forth in Mobile's petition heretofore, in order to obtain the business of Ideal Cement Company (herein called "Ideal"), a three-way contract was entered into in 1946 between United, Mobile and Ideal under which United agreed to supply gas to Mobile for resale to Ideal for a period of ten years at agreed special rates. Mobile recognizes the right and authority of this Commission to set aside or modify its contract with United. However, since this is a special contract between the parties it can be altered only after a finding that it is "unreasonable", not by the mere unilateral filing by United of proposed increased rates.

Moreover, Mobile maintains that in a case such as this the proper procedure for United is pursuant to Section 5(a) of the Act to obtain a determination that the existing contract is "unreasonable". Section 5(a) is designed for this very purpose. United's position is, in effect, that no contract between utilities is worthy of the name, since at any time it may be scrapped merely by filing a new set of

[fol. 45] rates under Section 4 of the Act and, if necessary, having a hearing on the reasonableness of these new rates. We submit that under this theory Section 5(a) is rendered virtually meaningless. Furthermore, it is United, not Mobile, which would limit the power of this Commission, for obviously, if no special contract between utilities is binding against the mere filing of new rates under Section 4, the Commission has no power to authorize such a contract between utilities at an agreed rate, although this might often be a most desirable and even necessary step to the efficient and continued operation of a utility.

[3] III

Section 4(e) Permits the Commission to Order United to Furnish a Bond and Mobile Will Be Irreparably Injured Unless a Bond Is Ordered in This Instance

In its Answer United maintains also that this Commission cannot order it to furnish a bond conditioned upon repayment of the increased rates which it may collect for sales to Mobile for resale to Ideal in the event it is determined that such increased rates were unlawfully instituted or are unreasonable. United bases its argument on the grounds that under the provisions of Section 4(e) of the Act this Commission is powerless to order a bond except in those cases where it is also permitted to suspend the effective date of proposed increased rates. Since the rates involved here are for resale to an industrial consumer and cannot be suspended, United says, the Commission cannot order United to post a bond for their repayment.

We submit that United misreads the language and intent of Section 4(e) of the Act. That section deals with three distinct subjects. First, the Commission is given authority to direct a hearing as to the reasonableness of proposed [fol. 46] increased rates and, pending such hearing, it may suspend the effective date of the proposed rate schedule for a maximum of five months, but the Commission may *not* suspend rates for the sale of gas for resale for industrial use only. Where proceedings have not been completed at the expiration of a suspension period the rates may nevertheless to put into effect. Secondly, Section 4(e) deals with the authority of the Commission to order the natural gas

company proposing increased rates to furnish a bond for the refund of rates which are allowed to become effective prior to Commission decision. Finally the section specifies who shall have the burden of proof at hearings and that such hearings shall be given prompt attention.

[4] Clearly, the proviso forbidding the suspension of industrial rates, and upon which United relies, is an exception only to the first portion of Section 4(e), that which grants the Commission authority to suspend rates. No such exception is made to the bonding authority afforded the Commission in the second portion of Section 4(e).

Moreover, the second part of Section 4(e) states that "(w)here increased rates or charges are *thus* made effective * * *" the Commission may order the posting of a bond (italics supplied). United reads this language most narrowly to restrict the authority of this Commission when it maintains, in effect, that the word "thus" refers only to rates which have been suspended and which are made effective after the expiration of the suspension period. Obviously the word "thus" refers to the preceding portion of Section 4(e) which permits rates to "thus" become effective in two ways; either (1) after the expiration of a suspension, which may be of any duration not in excess of five months, or (2) at once in the case of rates for sales for resale for industrial use and which may not be suspended. Surely [fol. 47] United would not claim that a bond could not be ordered in a case where this Commission was permitted to suspend a rate pending hearing but for good cause shown decided to allow that rate to become effective without suspension. Yet that is, in effect, what United now seems to argue.

Even if the reference in Section 4(e) to the Commission's authority to order a bond is read narrowly to apply only to rates which become effective after a suspension, it is clear that such reference is intended, not to limit the Commission's authority, but to negative any inference that without such a provision no bond could be ordered. Under Section 16 and the authority of the [5] Commission to carry out the administration of the Act the Commission can issue orders and attach conditions appropriate to such orders. A fundamental power in such cases is the authority to

require a bond and Section 4(e) in no way prohibits the Commission from exercising this power where industrial rates are sought to be increased.

In addition to the plain language of the statute it is clear that good sense and justice require the interpretation that the Commission's bonding authority extends to rates not subject to suspension. Since such rates are not afforded the protection of suspension and may be subject to collection throughout the period that a proceeding as to their lawfulness is in progress they, more than any others, require the protection of a bond. It is difficult to believe, in the absence of a clear statutory expression, that Congress intended to deprive this one type of gas sale not only of the safeguard of suspension, but also of the safeguard of a bond.

[fol. 48] IV

Consolidation of this Proceeding with Docket No. G-2210 Is Inappropriate Since this Proceeding Presents Unique Questions of Law and Fact and Since Consolidation Would Be Injurious to Mobile.

In its Answer United also urges that if the Commission refuses its request to dismiss Mobile's petition it order this proceeding consolidated in Docket G-2210. Docket G-2210, which itself has been consolidated with other dockets for hearing, is the proceeding involving hearing and investigation of the lawfulness of a number of increased rates proposed by United for certain town border sales and sales for resale to certain large industrial users.

[6] Mobile respectfully submits that consolidation of this proceeding with the matters in Docket G-2210 and the other dockets with which it has been consolidated is wholly inappropriate in this instance. The matters involved in the present proceeding herein relate only to one rate schedule governing sales by United to Mobile for resale to Ideal under a special and unique contract entered into between the three companies. The principal question raised is the propriety of the manner in which United has sought, unilaterally, to abrogate this agreement and whether such unilateral abrogation is permissible without first determining that the existing rate set forth in the said contract.

is "unreasonable". A determination of this question can be made without any need for consolidation with proceedings involving totally different questions and, if the Commission decides in Mobile's favor and rejects United's unilateral filing under Section 4 there will be no proceeding to consolidate.

[fol. 49] Moreover, Mobile submits that if the Commission refuses to reject United's filing and orders a hearing in the present proceeding as to the validity of United's proposed increase Mobile will suffer great harm and prejudice by a consolidation. The proceedings in Docket G-2210 involve many rates; they will unquestionably be lengthy and complex; and they are concerned primarily with the reasonableness of United's newly increased rates rather than any investigation of the "unreasonableness" of existing contract rates. If Mobile is compelled to await a disposition of the matters in Docket G-2210 before its arguments are determined and the validity of United's increase to Mobile covering resales to Ideal is decided, it will be seriously damaged by the fact that it is not afforded the protection of a five months' [7] suspension. Consequently, throughout the lengthy hearings on all of the rates involved in Docket G-2210 Mobile may be obliged to pay the increased rates which it maintains are unlawfully imposed upon it in breach of its contract with United.

The fact that Mobile has intervened in Docket G-2210 is of no relevance to the existence of this proceeding, for the questions there involved are totally different and Mobile, of course, will be prepared to offer any evidence which it may have as to the reasonableness of Uniteds' proposed increases in its other rate schedules for service to Mobile.

Furthermore, as previously discussed, United maintains that this Commission cannot order it to furnish a bond for repayment to Mobile of these increased rates for resale to Ideal if they are ultimately determined to have been unlawfully filed or to be unreasonable. Obviously, if United is correct about the Commission's inability to order a bond, Mobile should not be forced to await a determination of all [fol. 50] of the issues in Docket G-2210 before the legality of United's actions with respect to sales for resale to Ideal is decided.

Wherefore, your petitioner respectfully prays that the Commission issue an order granting it the relief requested in its petition herein; to wit:

(1) That the Commission forthwith enter an order amending and modifying its order of July 10, 1953 so as to provide that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 to United's FPC Gas Tariff, Original Volume No. 1, in so far as they apply to service to Mobile for resale to Ideal, be rejected; and further prays that, in the event the foregoing relief be denied,

[8] (2) the Commission enter an order amending and modifying its order of July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said Revised Sheets Nos. 39 and 40; and

(3) That the Commission forthwith issue an order substituting for paragraph (D) of its order of July 10, 1953 a new paragraph (D) reading as follows:

"(D) The request of United that First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be permitted to become effective on July 15, 1953 is denied";

(4) Further prays that the Commission forthwith enter an order directing that any increased rates which United may be entitled to collect from Mobile for sales to Mobile for resale to Ideal shall only be collected subject to refund to Mobile in the event and to the extent that said increased rates shall be determined to be illegal; and

[fol. 51] (5) That the Commission deny United's request that the proceeding in this Docket be consolidated with the proceedings in Docket No. G-2210; and

(6) For such other and further relief as to the Commission may seem just in the premises.

Respectfully submitted, (S.) Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for Petitioner Mobile Gas Service Corporation. Samuel M. Johnston, Dan T. McCall, Jr., of Counsel.

Winthrop, Stimson, Putnam & Roberts, William C. Chanler, Elliott E. Vose, Gerard Thomas, of Counsel.

[Verified, September 28, 1953 by William C. Chanler, attorney for Mobile.]

[Certificate of Service dated September 28, 1953 by Elliott E. Vose, of counsel for Mobile.]

[fol. 52] [1] BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-2227

In the Matter of MOBILE GAS SERVICE CORPORATION
PETITION BY MOBILE GAS SERVICE CORPORATION FOR REHEARING AS TO MATTERS DENIED BY THE ORDER OF THE COMMISSION ISSUED DECEMBER 7, 1953

Comes now Mobile Gas Service Corporation ("Mobile") and respectfully applies to the Commission pursuant to Section 19(a) of the Natural Gas Act and the Commission's Rules of Practice and Procedure for a rehearing as to certain relief requested by Mobile and denied by the order of the Commission issued in the above entitled proceeding on December 7, 1953.

Mobile being aggrieved by said order issued December 7, 1953, herewith upon its petition and memorandum in support of said petition, the answer of United Gas Pipe Line Company ("United") and Mobile's reply thereto, all filed herein, respectfully sets forth the following specifications of error and grounds upon which this application for rehearing is based:

[fol. 53] I

[2] Specifications of Errors

Mobile respectfully submits that it was error for the Commission by its order issued December 7, 1953

(a) to refuse to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to

Mobile for resale to Ideal Cement Company (herein called "Ideal");

(b) to refuse to modify and amend its order issued July 10, 1953 to provide solely for a hearing as to the lawfulness of the filing by United of the said revised sheets;

(c) to refuse to order that United make refund to Mobile of any portion or all of its said proposed increased rates and charges which may be determined to be illegal or to be unjust and unreasonable; and

(d) to dismiss Mobile's petition herein and to terminate this proceeding.

II

The Grounds for Rehearing

The grounds upon which Mobile seeks rehearing as to the matters denied by the order issued December 7, 1953 as aforesaid are as follows:

[fol. 54]

A

United Cannot Unilaterally Abrogate its Contract with Mobile and Ideal

The facts upon which Mobile has based its proceeding herein are set out in the documents heretofore filed with the Commission. These facts are undisputed by United, and are, in brief, as follows:

[3] In 1946 Mobile proposed to enter into a contract with Ideal Cement Company to supply the latter with natural gas for a period of ten years at a fixed rate which amounted to 12¢ per MCF. At that time, as at present, Mobile purchased all of its natural gas from United and their contract governing sales to Mobile for resale to large industrial customers provided that United should receive a certain percentage of Mobile's proceeds from each such sale, but not less than 16¢ per MCF.

Consequently, before it entered into the proposed contract with Ideal, Mobile notified United of its intention and obtained United's consent and agreement in writing to supply to Mobile the gas for resale to Ideal at percentage

rates which approximated 10.7¢ per MCF. In reliance upon this agreement by United the United-Mobile-Ideal contract was entered into under which Ideal was to receive gas at the 12¢ rate for a period of ten years. This contract was expressly approved by the Alabama Public Service Commission and the United-Mobile contract was duly filed with this Commission.

Subsequently, in 1952, United at the direction of this Commission filed new schedules which had the effect of converting its tariffs from a percentage basis to a dollars and cents basis, but which did not otherwise alter the rate for sales to Mobile for resale to Ideal.

[fol. 55] Thus, until United filed its First Revised Sheet No. 40 and Second Revised Sheet No. 39, providing for an increase in the rate to Mobile from 10.7¢ to 14.5¢ per MCF, the three companies operated under a contract designed to obtain Ideal's business and entered into in reliance upon United's agreement to the rate provisions.

Mobile submits that the Commission, by its order denying Mobile's requested reli , has permitted United unilaterally to abrogate this contractual agreement, has deprived Mobile of a valuable property right without [4] giving Mobile opportunity to be heard, and has caused Mobile to suffer serious losses and damages contrary to the rights given Mobile by its contract with United.

Mobile has consistently maintained that utilities are not powerless to enter into agreements which are binding as to rates. We have previously called to the Commission's attention the decision of the Supreme Court of the United States in *Wichita Railroad & Light Co.* v. *The Public Utilities Commission of the State of Kansas*, 260 U. S. 48, and the decision in *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 985. These decisions recognize the principle that a utility cannot break its contract merely by filing different rates under a regulatory statute but that it must first seek and obtain a determination that the contract which it would abrogate is "unreasonable". We have also maintained that the utility which would thus alter its agreements sustains its burden of showing such contracts to be "unreasonable" by demonstrating that they are injurious to the public interest.

The Commission by its order herein has ruled, in effect, that in the scheme of regulation established by the Natural Gas Act, there is no place for a binding contract between [fol. 56] two utilities or between a natural gas company and its customers; that at any time a contract (or at least its rate provisions) may be revoked by the filing of an increased rate. The contract, in short, becomes virtually meaningless.

Mobile respectfully submits that such a result is not in accordance with the principle of the *Wichita* case, *supra*, and can neither be what Congress intended or what law and equity require.

The inequitable result which follows from such a ruling is immediately apparent in this proceeding. Mobile, in reliance upon the agreement of United to accept a rate of [5] 10.7c per MCF, with United's consent, contracted to sell this gas to Ideal at 12c per MCF for a term of ten years. This contract was approved and put into effect by the Alabama Public Service Commission. The Public Service Law of Alabama (Section 325, Title 48, Alabama Code of 1940), as interpreted by the Supreme Court of that state (*Birmingham Elec. Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19), will not permit an intrastate contract to be changed unilaterally even by the Commission itself without the consent of the parties.

Mobile is thus placed in the position of being compelled to sell to Ideal for 12c per MCF gas which it must purchase from United at 14.5c per MCF. This is so despite Mobile's contract with United; despite the fact that the Commission in its order issued July 10, 1953 stated that the proposed increased rates "have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful"; and despite the fact that no obligation has been placed upon United to show at the outset why it is entitled to break its contract with Mobile.

Finally it must be pointed out that in ruling against concepts of a binding contract under the Gas Act, the Commis- [fol. 57] sion necessarily rules against its own authority to put into effect a contract, the rate provisions of which would be substantially binding, even though such power might some day be desirable. A brief example suffices to show the

need for and place of binding rate contracts. Large industrial customers located along gas pipe lines may have the choice of contracting to purchase their gas requirements directly from the pipe line company, or from a local distributing company, which purchases the gas from the pipe line for resale. Since the pipe line company's direct industrial sales are unregulated it can offer the customer a long term contract which will be binding as to its rate. The local utility, on the other hand, will [6] be unable to offer the industrial customer such a firm contract if any agreement the utility makes with the pipe line company as to the rates at which it is to purchase the gas for this resale is always subject to change whenever the pipe line company chooses, unilaterally, to file higher rates. If local utilities companies were unable to give such industrial customers assurance of a binding contract, or even to obtain such assurance from this Commission, they would be unable to compete for business which might well be necessary to their very survival.

It is thus apparent not only that the Commission's order of December 7 stands for a proposition which is alien to our concepts of contract and property rights and weakens the authority of the Commission, but it is also obvious that the order works an incalculable harm upon Mobile, which is caught between the Commission's order depriving it of its contractual rights and the law of its home state, which recognizes and protects the property rights contained in a contract.

Mobile has urged this Commission to revoke United's [fol. 58] filing of these Revised Sheets as an improper effort to avoid its contract. We have had no doubt that the Commission has authority to refuse to accept filings which are not in accordance with the law. Such is the case here where United, without any showing that its contract with Mobile is entitled to be set aside, has attempted to replace that agreement with a rate which is confiscatory of Mobile's property and rights without due process of law.

Consequently, Mobile reasserts its contention that the Commission should not permit its machinery to be utilized unlawfully and that the filing by United should be rejected, and asserts that it was error for the Commission to refuse to do so.

[7] B

It Was Error for the Commission to Refuse a Hearing as to the Lawfulness of United's Filing and to Order United to Make Refund

Mobile recognizes that Section 4 of the Act provides the method whereby rate increases may be effectuated; but Mobile decidedly does not subscribe to the argument, apparently adopted by the Commission, that there is no place in the scheme of the Act or in Section 4 for binding contracts between utilities and their customers. We have urged previously and above that public utilities have not been stripped of the right to make binding contracts, subject to the limitation that where such contracts are injurious to the public interest they may be modified. Consequently, we have urged that absent such a showing in the present proceeding, United's filing should be rejected. However, in the event that the Commission continues to allow United's increased rates to Mobile to remain in effect, it is error for [fol. 59] the Commission to deprive Mobile of the protection which the Natural Gas Act affords it and to which it is plainly entitled by fundamental principles of law.

In the first place, the Commission should order a hearing, as requested by Mobile, as to the lawfulness of United's filing. This hearing can be, in most respects, an ordinary Section 4(e) hearing. However, in its order directing such hearing, the Commission should require United to go forward with the burden of demonstrating that its agreement with Mobile *vis à vis* Ideal is "unreasonable"; that adherence to that agreement is injurious to the public interest because it has become so burdensome to United as to affect its ability to serve its customers properly. United, if it can sustain this burden, can then offer evidence to establish that its proposed new rates are just and reasonable.

[8] In addition to a hearing in which United must establish that its existing contract is "unreasonable," the Commission should also order United to refund to Mobile any portion of its increased rates which are ultimately found to be unlawful. In its order of December 7 the Commission takes the position urged by United that because the rates in question are expressly excluded from the Commission's

power of suspension, they are also beyond the Commission's power to order refund.

We respectfully submit that neither the language of Section 4 nor the intent of Congress can support such a flagrant deprivation of all of Mobile's rights. To adopt this position is to assume that Congress countenanced not only the out-of-hand breach of a solemn agreement without any prior showing of its unreasonableness, but also intended that in addition to such breach of agreement the party offended against should suffer serious financial loss throughout an [fol. 60] indeterminate period in which its rights are under consideration.

It is clear, unless the language is read most narrowly, that the Commission's authority to order a refund extends to all rates "made effective" under Section 4(e), and that the proviso against suspension of industrial rates does not at the same time restrict the power to order refunds. Plainly, if Congress had intended that industrial rates be deprived of the protection of *both* suspension and refund it would have expressly so provided. Instead it did so only as to suspension, which serves to emphasize that no exception to the refunding power was intended.

The Commission, on page 4 of its order, takes the position that "an interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates. * * *." We submit that there [9] is no relationship between the two. In the case of ordinary rate increases suspension postpones the date when the proponent of the increase may start to collect the higher amount, even if it is found justified, and refund protects the purchaser in the event the increase is found unjustified. Thus the purchaser has the double protection of a delayed effective date and of a refund. Where the rates involved are for sales for resale for industrial use only, however, the purchaser is deprived of the protection of a delayed effective date. The seller begins to collect his increased rates promptly after they are filed. Now the Commission would say that not only must the seller receive this advantage over the purchaser when his higher rates are found justified, but also that he may keep any amounts so collected even if they are ultimately found not to be justified.

[fol. 61] The Commission has pointed out that under the consolidated proceedings involving United's rate structures, all of United's rates are being investigated. However, it has dismissed Mobile's petition and caused this proceeding to be terminated without any order or reservation to Mobile of its rights to advance its arguments in the consolidated dockets. Whether Mobile has any right to assert its position in the consolidated dockets or not, it was nevertheless error for the Commission herein to terminate this proceeding without affording Mobile a prompt hearing as to its rights. Such a step is obviously essential in this situation where proposed increased rates which conflict with a contractual agreement have been permitted to go into effect without suspension; where even the minimal protection to Mobile of a refunding order is withheld; and where the long delay involved in a determination of Mobile's rights in the consolidated proceeding would work incalculable harm to Mobile. Moreover, Mobile has no opportunity to pass its own increased costs along to its [10] customers since, as demonstrated previously, the law of its home state will not permit the abrogation of binding contracts.

Plainly, every dictate of law and equity requires that if the Commission will not reject United's filing it must direct a prompt hearing on Mobile's contentions herein and, pending a final determination of the lawfulness of United's action, that United be required to refund any portion of the increased rate received from Mobile which may ultimately be held unlawful.

Wherefore, by reason of the grounds hereinabove set forth, Mobile respectfully prays that the Commission forthwith grant a rehearing of its said order issued on De-[fol. 62] cember 7, 1953 with reference to matters herein complained of and further that the Commission grant such other relief as may seem just in the premises.

Respectfully submitted, Winthrop, Stimson, Putnam & Roberts, Attorneys for Petitioner, Mobile Gas Service Corporation.

William C. Chanler, of Counsel.

[Verified January 6, 1954, by William C. Chanler]

[Certificate of Service dated January 6, 1954, by Gerard Thomas]

[fol. 63] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH, DALE E. DOTY and SEABORN L. DIGBY.

Docket No. G-2227

In the Matter of Mobile Gas Service Corporation

ORDER DENYING APPLICATION FOR REHEARING—February 4, 1954

Upon consideration of Mobile Gas Service Corporation's application for rehearing filed January 6, 1954, of the Commission's opinion and order issued in the above-entitled proceeding on December 7, 1953, and the allegations in support thereof;

The Commission *finds:*

No new facts have been presented or alleged, and no new principles of law have been set forth in the application for rehearing which either were not fully considered by the Commission before it entered the opinion and order issued December 7, 1953, or having now been considered, warrant rehearing, modification or rescission of the aforesaid opinion and order. Accordingly, it is necessary and appropriate for carrying out the provisions of the Natural Gas Act that the aforesaid [fol. 64] application for rehearing be denied as hereinafter ordered.

The Commission *orders:*

Mobile Gas Service Corporation's application for rehearing of the Commission's opinion and order issued

December 7, 1953, in the above-entitled matter be and the same is hereby denied.

By the Commission. Leon M. Fuquay, Secretary. (Seal)

Adopted: February 3, 1954

Issued: February 4, 1954

[fol. 65]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Mobile Gas Service Corporation, Petitioner,

v.

Federal Power Commission, Respondent.

PETITION TO REVIEW AND SET ASIDE OPINION AND ORDER OF THE FEDERAL POWER COMMISSION—March 18, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices thereof:

Mobile Gas Service Corporation* herewith respectfully petitions this Court to review the opinion and order of the Federal Power Commission** issued December 7, 1953 in Docket No. G-2227, entitled "In the Matter of Mobile Gas Service Corporation." The opinion and order is printed in the Appendix hereto (App. p. 1).

The Issue Presented

The issue sought to be reviewed can be simply stated:

Does the Natural Gas Act render a duly filed contract for the purchase of natural gas at agreed rates for a term of years void *ab initio*, or merely voidable upon a finding that the contract contravenes the public interest?

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* Herein sometimes called "Mobile" or petitioner.

** Herein sometimes called "Commission" or respondent.

[fol. 66] The Nature of the Administrative Proceedings Sought to be Reviewed

Mobile is seeking review of an order of the Commission pursuant to which it has been deprived of its rights under a duly filed contract for the purchase of natural gas at an agreed rate over its objection, and without any hearing or determination that the public interest required that the contract be abrogated.

Mobile is a public utility under the laws of Alabama distributing and selling natural gas to consumers in Mobile, Alabama and the surrounding communities and areas. Much of Mobile's business is in the resale of natural gas to industrial customers. It purchases its entire supply of gas for these resales from United Gas Pipe Line Company,* a natural gas company within the meaning of the Natural Gas Act (52 Stat. 821, 15 U.S.C., § 717(a)(6)).

Mobile's purchases of gas from United are made pursuant to a contract entered into between Mobile and a predecessor to United in January, 1936, as modified by later agreement between Mobile and United in October, 1941 and July 1946. These agreements as modified provide that for gas for resale to industry Mobile will pay United certain percentages of Mobile's proceeds from the resales, but in any event not less than 16¢ per MCF of gas unless United has agreed in writing to accept less than 16¢. These contracts were filed with the Federal Power Commission as United's Gas Rate Schedule FPC No. 20 and Supplement Nos. 7 and 9 thereto.

In 1946 Mobile proposed to contract with Ideal Cement Company to supply it with natural gas for a period of ten years at a fixed rate of 12¢ per MCF. Mobile advised United of this proposal and requested that it accept the percentage of Mobile's proceeds from the resales to Ideal [fol. 67] provided for in its contract with Mobile even though this percentage would return United less than 16¢ per MCF, the minimum rate to which it was entitled by that contract.

On July 30, 1946 United agreed in writing to Mobile's request, and in reliance on this agreement by United, Mo-

* Herein sometimes called "United."

bile entered into the contract to supplpy gas to Ideal at 12¢ per MCF for ten years.* This contract was expressly approved by the Alabama Public Service Commission, and United's agreement to accept less than 16¢ per MCF for gas sold to Mobile for resale to Ideal was duly filed with the Federal Power Commission as Supplement No. 10 to United's Gas Rate Schedule FPC No. 20, thus becoming the legal rate for such sales.

The percentage rates which United thus agreed to accept resulted in payments by Mobile to United at an actual rate of 40.7¢ per MCF for the gas which United supplied for resale to Ideal. In May, 1952 United replaced its percentage rates on file with the Federal Power Commission with its FPC Gas Tariff Original Volume No. 1, which substituted a flat rate of 10.7¢ per MCF for gas sold to Mobile for resale to Ideal. For the percentages provided for under the original United-Mobile-Ideal agreement. United informed Mobile that this filing was made in order to comply with a Commission requirement that all its rates be converted from a percentage basis to a dollars and cents basis.

Thus United's sales of gas to Mobile at 10.7¢ per MCF for resale to Ideal at 12¢ per MCF continued pursuant to the United-Mobile-Ideal contract until June 24, 1953. On that day United filed with the Commission a number of proposed increases in its rates for certain town border sales, including First Revised Sheet No. 46 and Second Revised Sheet No. 39 to its Gas Tariff Original Volume No. 1, which provided for an increase from 10.7¢ to 14.5¢ per MCF in the rate to Mobile for resales to Ideal. The [fol. 68] Commission on July 10, 1953 issued an order which stated, in part, that these increased rates and charges "* * * have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful" and ordered these rates suspended pending a hearing as to their lawfulness. However, since Section 4 (e) of the Natural Gas Act prohibits the suspension of proposed increased rates for sales for resale for industrial use only, the Commission's order

* Herein sometimes referred to as the United-Mobile-Ideal contract.

did not suspend the new rate to Mobile, but expressly permitted it to go into effect on July 25, 1953. Thus Mobile has been compelled since that date to pay 14.5¢ per MCF to United for gas which it is obligated to resell to Ideal Cement Company for 12¢ per MCF. The proceeding involving all of these rate increases sought by United was denominated Docket G-2210 by the Commission and was ordered consolidated with a number of other proceedings already pending dealing with United's rates and charges.

In response to United's attempt to substitute this 14.5¢ rate to Mobile for the 10.7¢ rate agreed upon in their contract, Mobile, on August 4, 1953, filed its petition protesting United's action and asserting its contract rights.* Mobile contended that United could not, unilaterally and without Mobile's assent, abrogate the contract between them *by the mere filing of an increased rate;* that the contract was binding and effective unless and until the Commission found after a hearing that the contract was so unreasonable that the public interest required that it be abrogated. In its petition Mobile requested that United's filing of this increased rate be rejected by the Commission as unlawful. [fol. 69] It also prayed that if the Commission would not reject United's filing it (a) order a hearing solely as to the lawfulness of United's filing of the increased rates and charges in violation of its contract with Mobile and (b) that it enter an order directing that United refund any portion or all of the increased rates or charges collected from Mobile (1) if the filing by United is unlawful or (2) if these rates are ultimately found to be unlawful.

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* Mobile's petition was originally filed in the pending consolidated proceeding, Docket G-2210, *et al.* However, since Mobile's motion for permission to intervene in that proceeding had not been granted at the time of the filing, and since it was apparent that immediate relief could not be obtained in Docket G-2210, the petition was amended so as to request the assignment of a separate docket number. This request was granted and Mobile's petition was assigned Docket G-2227, which is the docket in which the order herein appealed from was issued. This proceeding was never ordered consolidated with the proceedings in Docket G-2210, *et al.*

United, on September 11, 1953, petitioned to intervene in this proceeding and interposed an answer to Mobile's petition in which it opposed all of the relief requested by Mobile and asserted, in substance, that its contract with Mobile was not binding or enforceable as against United's mere filing of the higher rate. On September 28th Mobile filed its reply to United.

Thereafter, no hearings or other proceedings took place in the matter (Docket G-2227) until on December 7, 1953 the Commission issued the order and opinion which is the subject of this Petition to Review.

That order is set out in full in the Appendix and therefore will not be repeated fully here (App. p. 1). Suffice it to say that the opinion and order deny all of the relief requested by Mobile and order the proceeding terminated and Mobile's petition dismissed. The Commission refuses to reject United's filing of the increased rate and says that the filing is proper and lawful and that rate increases may be initiated by a natural gas company only pursuant to Section 4 of the Natural Gas Act. The Commission thus holds in effect that a duly filed rate contract, such as that here in issue, is void *ab initio*.

The Commission likewise refuses to order United to refund the increased amounts collected from Mobile if the filing is illegal or if the increased rate is found to be unlawful. This relief is denied Mobile on the ground that [fol. 70] because the Commission is specifically prevented by the proviso in Section 4 (e) of the Natural Gas Act from ordering the suspension of rates for resale for industrial use only it is also without authority to order a refund in the case of such rates.

Finally, the Commission states that questions relating to the reasonableness of United's proposed increase in rates and charges are already at issue in other pending proceedings and refuses to order a separate hearing solely as to the unlawfulness of United's filing. The Commission indicates that Mobile could be heard in Docket G-2210, but that proceeding deals only with the reasonableness of the proposed new rates, and not with the question of the reasonableness of United's existing contract. Thus Mobile is at one and the same time deprived of its contract rights

and required to pay a confiscatory rate, without any finding or determination whatsoever that its existing contract with United is against the public interest. It is subjected to this action peremptorily, without a hearing and without even the protection of a bond or a refund order.

Being aggrieved by the Commission's order issued December 7, 1953 Mobile on January 6, 1954 filed with the Commission its petition for a rehearing. This petition was denied by the Commission in its order issued February 4, 1954.*

Jurisdiction and Venue

The statute upon which venue and jurisdiction in this case are based is Section 10(b) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 831; 15 U.S.C. 717r (b)), the pertinent part of which reads as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [fol. 71] circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

United is a natural-gas company organized and existing under and by virtue of the laws of the State of Delaware and thus is located in the Third Circuit within the meaning of Section 19(b) of the Natural Gas Act. The facts upon which jurisdiction is based are briefly stated. United is a natural-gas company within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Commission. Mobile, the petitioner, is a party to the proceedings before the Commission wherein the Commission issued the order and opinion of December 7, 1953 hereinabove re-

* This order is reprinted at page 8a in the Appendix.

ferred to relating to United, and Mobile is aggrieved by that order, since it is thereby deprived of its contract rights without a hearing, and is compelled to pay 14.5¢ per MCF for gas which it is obligated to resell for 12¢ per MCF. Within thirty days after the date of the order Mobile, pursuant to Section 19(a) of the Natural Gas Act, filed with the Commission its petition for rehearing. This application for rehearing of the Commission's opinion and order was denied by Commission order issued February 4, 1954 (App. p. 8a) and thus denied within the meaning of Section 19 of the Natural Gas Act. It is therefore apparent from the action by the Commission that this petition to review is filed within the sixty day period fixed by Section 19(b) of the Act.

[fol. 72] Grounds upon Which Relief Is Sought

1. The Commission erred in refusing to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to Mobile for resale to Ideal. A rate contract which has been duly filed with the Federal Power Commission is not void *ab initio*, but is a valid, binding and enforceable contract until and unless modified or abrogated after a hearing and finding by the Commission that it is so unreasonable or otherwise so burdensome that the public interest requires that it be abrogated or modified. Such a contract rate cannot be repudiated by a mere *ex parte* filing under Section 4 of the Act of a proposed higher rate by one party to the contract. Such a filing, being unlawful and unauthorized by the Act, should be rejected, and the Commission's refusal to reject it has deprived Mobile of its property and rights without due process of law.

2. Having refused to reject the filing, the Commission erred in refusing to modify and amend its order of July 10, 1953 so as to provide for a hearing solely as to the lawfulness of the filing by United of the said revised sheets. The reason given by the Commission for such refusal, that all questions relating to the reasonableness of United's proposed new rates were pending before it in another proceeding, affords no relief to Mobile, inasmuch as the only matters before the Commission in that proceeding are the

reasonableness of such new rates, as distinguished from the reasonableness of Mobile's contract with United. If such new rates are found by the Commission to be reasonable, they will become the legal and effective rates, even though Mobile's contract may itself be perfectly reasonable. The effect of this refusal, therefore, is to deprive Mobile of any opportunity at any time to test the lawfulness and [fol. 73] reasonableness of its existing contract, and to compel it to pay a rate in excess of the contract rate without an opportunity to be heard.

3. The Commission erred in refusing to order that United make refund to Mobile of any portion or all of the increased rate collected from Mobile which may be determined to be illegal or to be unjust and unreasonable. As a result of this refusal by the Commission, Mobile may be compelled to pay rates which will later be found to be illegal, unjust or unlawful, without any opportunity to recover the same at any time, and to pay such rates before there has been any hearing or determination that they are legal, just or reasonable. Such a result is a deprivation of Mobile's property and rights without due process of law.

4. The Commission erred in dismissing Mobile's petition herein and in terminating the proceeding. Such dismissal and termination deprives Mobile of any opportunity to be heard as to its rights under its contract.

Conclusions

WHEREFORE, Petitioner prays:

1. That a copy of this petition be served forthwith upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act;

2. That Respondent, Federal Power Commission, be required, in conformity with Section 19(b) of the Natural Gas Act and Rule 18(7) of this Court, to certify and file with this Court a transcript of the record upon which the order and opinion here sought to be reviewed were entered;

3. That petitioner be notified by the Clerk of this Court when said transcript has been received;

[fol. 74] 4. That this Court review the Commission's opinion and order issued December 7, 1933 and upon such review (a) reverse and set aside the said opinion and order;

(b) order that the Commission reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39; (c) and order that United be directed to refund to Mobile with interest all rates and charges collected by it from Mobile in excess of 10.7¢ per M C F for sales of natural gas for resale to Ideal.

5. That this Court exercise jurisdiction over the parties and subject matter of this petition and grant to petitioner such other and further relief as the rights and equities of the cause may require and as to the Court may seem just in the premises.

Respectfully submitted, Mobile Gas Service Corporation, by Winthrop, Stimson, Putnam & Roberts, its attorneys, (S.) William C. Chanler, a Member, Johnston, McCall & Johnston, Counsel for Mobile Gas Service Corporation.

Dated: March 8, 1954.

[fol. 75] *Duly sworn to by William C. Chanler, March 8, 1954. Jurat omitted in printing.*

[fol. 75a] [File endorsement omitted]

[fol. 76]

Before the Federal Power Commission.

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey

In the Matter of United Gas Pipe Line Company

Order Allowing Supplemental Rate Schedule to Take Effect December 4, 1941

It appearing to the Commission that an application has been filed by United Gas Pipe Line Company, requesting that the United Gas Pipe Line Company Supplement No. 7 to Rate Schedule FPC No. 20, providing for the sale of natural gas to Mobile Gas Service Corporation, be allowed

to take effect as of July 1, 1941; and the Commission having considered the same;

It is *ordered* that:

(A) The aforesaid supplemental rate schedule be and it is hereby allowed to take effect as of July 1, 1941;

(B) The aforesaid supplemental rate schedule shall be deemed to have been filed and published in compliance with the Natural Gas Act;

(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7(b) of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

[fol. 77] (D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, against the applicant.

(Seal) By the Commission.

(S.) Leon M. Fuquay, Secretary.

Before the Federal Power Commission

Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse and Nelson Lee Smith

In the Matter of United Gas Pipe Line Company

Order Allowing Supplemental Rate Schedule to Take Effect—September 17, 1946

Upon consideration of the application filed by United Gas Pipe Line Company requesting that Supplement No. 10 to Supplement No. 7 to its Rate Schedule FPC No. 20 providing for the sale of natural gas to Mobile Gas Service Corporation for resale be allowed to take effect as of July 26, 1946;

The Commission *orders* that:

(A) The aforesaid supplemental rate schedule be and it hereby is allowed to take effect as of July 26, 1946;

(B) The aforesaid supplemental rate schedule shall be deemed to have been filed and published in compliance with the Natural Gas Act;

[fol. 78] (C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated rate schedule; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;

(D) This order is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending, or hereafter instituted, by or against the applicant.

By the Commission.

J. H. Gutride, Acting Secretary.

Date of Issuance: September 23, 1946.

Before the Federal Power Commission
Letter Order on Supplement No. 9
Federal Power Commission,

Washington 25

Re: United Gas Pipe Line Company
Supplement No. 9 to
Rate Schedule FPC No. 20,

November 4, 1946.

Gentlemen:

This is to advise you that the above rate filing submitted by your company has been accepted for filing and that January 1, 1947 has been designated as the effective date thereof.

[fol. 79] This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constitut

ing approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in above designated rate schedule; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

Very truly yours, Leon M. Fuquay, Secretary.

Messrs. Leighton & Gamble, National Savings & Trust Bldg., Washington 5, D. C.

Before the Federal Power Commission

Statement Pursuant to Section 154.85 of F. P. C. Rules and Regulations

May 29, 1952.

Reference: F. P. C. Rate Schedule No. 20

United Gas Pipe Line Company

This statement is made pursuant to Section 154.85 of Federal Power Commission Rules and Regulations with reference to the existing Gas Sales agreement between United Gas Pipe Line Company and Mobile Gas Service Corporation, or their predecessors in title, dated January 1, 1936, as amended and supplemented.

This Contract, as amended and supplemented, continues in effect as an executed Service Agreement for service to the extent that the provisions thereof are not superseded by or inconsistent with the applicable provisions of the Rate [fol. 80] Schedules and General Terms and Conditions of United Gas Pipe Line Company's Federal Power Commission Gas Tariff.

The following provisions of said contract, and amendments and supplements thereto (herein identified by F. P. C. Supplement Number to the above numbered Rate Schedule)

remain in effect and have not been superseded by said Gas Tariff:

	Part Retained
Preamble	All
Article I	All
" II	All
" III	All
" IX	Last paragraph
" XI	All
" XII	All
" XIV, as amended by Supplement No. 7	All of Article XIV and Article 4 of Supplement No. 7
" XVI	All
" XVII	All
" XVIII	All
Testimonium Clause and Signatures	All
Supplements:	
Supplement No. 3 to Supplement No. 9	Last paragraph on Page 3 and 1st paragraph on page 4, and Exhibit A thereto.
Supplement No. 4 to Supplement No. 9	Last paragraph on page 3 and 1st paragraph on page 4, and Exhibit A thereto.
Supplement No. 8 to Supplement No. 9	Last 2 lines on page 3 through 1st full paragraph on page 4, and Exhibit A thereto.
Supplement No. 10	All of page 1 and 1st paragraph through the work "delivery" in the 8th line of page 2

[fol. 81] Before the Federal Power Commission

Very truly yours, Leon M. Fuquay, Secretary.

Commissioners: Thomas C. Buchanan, Chairman; Dale E. Doty and Harrington Wimberly

Docket No. G-2019

In the Matter of United Gas Pipe Line Company

Order Allowing Conversion Tariff to Become Effective, in Part, Suspending Conversion Tariff, in Part, and Suspending Notices of Cancellation—July 31, 1952

On July 3, 1952, United Gas Pipe Line Company (United) filed its proposed conversion tariff, which, unless suspended, will become effective August 3, 1952, and will result in an increase of approximately $9,500,000 to five natural-gas pipe-line companies, based upon United's estimated sales for the twelve-month period ending April 30, 1953. The proposed conversion tariff is designated United Gas Pipe Line Company's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2.

Concurrently with its filing of July 3, 1952, and subsequently on July 11, 1952, United submitted proposed notices of cancellation of rate schedules on file with the Commission covering, in whole or in part, sales of natural gas which United alleges are no longer in interstate commerce and subject to the jurisdiction of the Commission, or have never been subject to the jurisdiction of the Commission because they do not involve sales of gas in interstate commerce. The proposed notices of cancellation are set forth in Appendix A hereof.

Included in the proposed notices of cancellation is a notice of cancellation purporting to cancel, in part, Rate Schedule FPC No. 73, which covers the sale of natural gas by United to Willmut Gas & Oil Company (Willmut), a distributor [fol. 82] of natural gas in Mississippi. Willmut objects to said proposed cancellation asserting that the question of the jurisdiction of the Commission over all of United's sales to Willmut are at issue in the complaint proceeding entitled

In the Matter of Willmut Gas & Oil Company, et al. v. United Gas Pipe Line Company at Docket No. G-1158, in which proceeding hearings have been held, briefs have been filed, and the matter is now pending before the Presiding Examiner for initial decision.

By its proposed conversion tariff and proposed notices of cancellation United proposes to supersede all of the rate schedules it has on file with the Commission.

The principal changes which would be effected by the proposed conversion tariff for city-gate sales are the establishment of specific rates for industrial gas in lieu of the existing revenue-sharing arrangements, a changeover from all-requirement service to specific volumetric obligations upon execution of new service agreements, the elimination of tax adjustment clauses and provisions relating to negotiation of changes in rates, standardization of measurement bases and billing practices, and minimum heat content guarantee.

The proposed conversion tariff respecting sales to and services for United's pipe-line customers involves (a) restatements of two rate schedules as Rate Schedules PL-1 and PL-2 without change, (b) proposed substantial increases in rates for other sales under the conversion tariff Rate Schedule PL-3, and (c) proposed substantial increases in rates for transportation services under the conversion tariff Rate Schedules T-1, T-2, and T-3. The increases in rates approximate $9,500,000 under the proposed conversion tariff Rate Schedules PL-3, T-1, T-2, and T-3.

United also requests permission, pursuant to Section 154.52 of the Regulations under the Natural Gas Act (18 CFR 154.52), to file the transportation contract with Mississippi River Fuel Corporation and three exchange service arrangements, now rendered under letter agreements, as [fol. 83] special rate schedules to be contained in Original Volume No. 2. No changes are proposed in these arrangements.

In addition, United filed, pursuant to Section 154.85 of the Regulations under the Natural Gas Act (18 CFR 154.85), statements of the presently effective rate schedules, identifying the contract provisions which are not superseded by or in conflict with other applicable provisions of the rate

schedules and the General Terms and Conditions of the proposed tariff and which are to remain in effect.

United asserts that increased rates are necessary because of the impact of the general trend of increasing costs, including the cost of purchased gas, the Texas gas gathering tax, proposed payroll increases, and pension costs for past service benefits.

In addition to adjustments to book costs for the foregoing, United's claimed costs of service are premised on a rate base including the total amounts in its Gas Plant Acquisition Adjustment account which, in whole or in part, may be improper for this purpose; and amounts for working capital which have been computed without regard to the availability of Federal and other tax accruals for such purpose. United also claims a rate of return of 6½% without submitting financial facts in support thereof, income taxes associated with such rate of return, and the expense of amortizing the total amounts in the aforesaid Gas Plant Acquisition Adjustment account on an accelerated basis.

It appears, therefore, that for these reasons, among others, the proposed increase in rates and charges as contained in proposed Rate Schedules PL-3, T-1, T-2, and T-3 and changes in conversion tariff provisions relating thereto may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, and may place an undue burden upon ultimate consumers of natural gas.

All of United's customers, as well as interested regulatory agencies, were invited to submit comments with respect to the application for the proposed changes in rates. Com- [fol. 84] ments have been received from the five pipe-line customers, seven city-gate customers, and two State commissions. Generally, the customers and State commissions object to the proposed increase, or assert they are unable to determine that the proposed increase is justified, or request that the Commission suspend the proposed conversion tariff.

The Commission *finds*:

(1) It is necessary or appropriate to carry out the provisions of the Natural Gas Act and to aid in the enforcement thereof in the public interest, that the Commission enter upon a hearing pursuant to the authority contained in Sec-

tion 4(e) thereof, concerning the lawfulness of the proposed rates, charges, classifications or services contained in Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United's proposed conversion tariff together with the applicable General Terms and Conditions and pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation listed in Appendix A hereof and, pending hearing and decision thereon, that the operation of United's proposed Rate Schedules PL-3, T-1, T-2, and T-3 together with the applicable General Terms and Conditions and pre-existing contract statements pertinent thereto; and United's proposed notices of cancellation as set forth in Appendix A hereof be suspended and the use thereof deferred as provided by the Natural Gas Act. In all other respect it is appropriate to permit United's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, to become effective as of August 3, 1952.

(2) Good cause has been shown to permit the filing of the special operating arrangements set forth in Original [fol. 85] Volume No. 2 as special rate schedules pursuant to the provisions of Section 154.52 of the Commission's Regulations under the Natural Gas Act.

The Commission *orders*:

(A) Pursuant to the authority contained in Section 4 of the Natural Gas Act, a public hearing be held at a time and place and at a date to be fixed by further order of the Commission concerning the lawfulness of the rates, charges, classifications or services, subject to the jurisdiction of the Commission, as set forth in proposed Rate Schedules PL-3, T-1, T-2, and T-3 of United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation set forth in Appendix A hereof.

(B) Pending such hearing and decision thereon, United Gas Pipe Line Company's proposed Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1,

including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto; and United Gas Pipe Line Company's proposed notices of cancellation set forth in Appendix A hereof, be and the same are hereby suspended and their use deferred until January 3, 1953, and until such further time as such proposed rate schedules, applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, and proposed notices of cancellation may be made effective in the manner prescribed by the Natural Gas Act.

[fols. 86-87] (C) In all other respects, United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, be and they are hereby allowed to become effective as of August 3, 1952.

(D) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, particularly subsections (b) and (c) thereof; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such services or rates provided for in the above-described tariff, the applicable General Terms and Conditions together with pre-existing contract statements pertinent thereto; nor shall it be deemed as recognition of any claimed contractual right or obligation affecting or relating to such services or rates.

(E) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in Docket No. G-1142, Docket No. G-1158, and in any proceeding now pending, or hereafter instituted, by or against United Gas Pipe Line Company.

(F) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) [18 CFR 1.37(f)] of the Commission's Rules of Practice and Procedure.

(G) The effective date of this order shall be July 31, 1952.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: August 1, 1952.

[fol. 88] BEFORE THE FEDERAL POWER COMMISSION

Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Leland Olds and Harrington Wimberly

Docket No. G-1142

In the Matter of UNITED GAS PIPE LINE COMPANY

ORDER INSTITUTING RATE INVESTIGATION—October 12, 1948

It appearing to the Commission that:

(a) United Gas Pipe Line Company (United Gas) owns and operates a natural-gas transmission pipe-line system located in the States of Texas, Mississippi, Louisiana, Alabama and Florida, and by such operations Applicant is engaged in the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G-232 (3 FPC 863).

(b) On the basis of data available to the Commission, the rates, charges, services or classifications for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission by United Gas [fol. 89] Pipe Line Company may be unjust, unreasonable; unduly discriminatory or preferential.

The Commission *finds* that:

It is necessary and proper in the public interest, and to aid in the enforcement of the provisions of the Natural Gas Act, that an investigation be instituted by the Commission into and concerning any rate, charge, service or classification, demanded, observed, charged or collected by United Gas Pipe Line Company, for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and any rule, regulation, practice, or contract affecting such rate, charge, service or classification.

The Commission, on its own motion, *orders* that:

An investigation be and it hereby is instituted for the purpose of enabling the Commission:

(A) To determine whether any rate, charge, service, or classification demanded, observed, charged or collected by United Gas Pipe Line Company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission or any rule, regulation, practice or contract affecting such rate, charge, service, or classification, is unjust, unreasonable, unduly discriminatory or preferential;

(B) If, after hearing, it shall find that any such rates, charges, services, classifications, rules, regulations, practices or contracts are unjust, unreasonable, unduly discriminatory or preferential, to determine and fix by appropriate order or orders, just, reasonable, non-discriminatory or non-preferential rates, charges, services, classifications, rules, [fol. 90] regulations, practices or contracts to be thereafter observed and in force.

By the Commission.

Leon M. Fuquay, Secretary.

Date of Issuance: October 13, 1948.

Before the Federal Power Commission

Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper and Nelson Lee Smith

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matter of United Gas Pipe Line Company

Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to Become Effective on Thirty Days' Notice Pending Hearing, Consolidating Proceedings, and Fixing Date of Hearing.—July 10, 1953

On June 24, 1953, United Gas Pipe Line Company (United) tendered for filing its First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Re-

vised Sheets Nos. 23, 31 and 39 to its FPC Gas Tariff, Original Volume No. 1, containing increased rates and charges for certain town-border sales, proposed to be made effective as of July 15, 1953.

The increased rates and charges would result in an estimated increase of $1,691,000 per year based on actual sales for the calendar year 1952, or $1,678,000 based on estimated [fol. 91] sales for the year 1953, in the rates and charges presently on file with the Commission in United's tariff.

From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, Second Revised Sheets Nos. 23, 31 and 39, as tendered for filing on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful. By reason of the proviso of Section 4(e) of the Natural Gas Act,[1] however, the proposed increase in rates reflected in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension. Since good cause has not been shown by United for the requested effective date of July 15, 1953, as required by Section 4(d), First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 can only be permitted to become effective on July 25, 1953, *i. e.*, upon thirty days' notice as provided in Section 4(d).

The rates and charges proposed to be increased by United are among the rates and charges which are the subject of the consolidated proceedings in *In the Matters of United Gas Pipe Line Company*, Dockets Nos. G-1142, G-1508, G-2019, and G-2074. These proceedings are in recess until July 20, 1953, at which time United is to complete its case-in-chief in those proceedings.

The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capi-

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[1] "*Provided*, That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only."

tal, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Dockets Nos. G-1141, G-1508, G-2019, and G-2074.

It appears appropriate and desirable to consolidate the [fol. 92] proposed application filed on June 24, 1953, for an increase in rates with the proceedings in the consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074 so that the common issues raised by these various proceedings may be heard together.

By letter of June 26, 1953, customers of United and interested State commissions were invited to make comments in regard to the rate increase application filed June 24, 1953. Comments were received from the Alabama Public Service Commission, the cities of Tyler, Texas, and Bastrop, Louisiana, and six customers. Generally, objections were made to the proposed rate increase. No comment was received from United Gas Corporation which is the principal town-border customer and the parent company of United.

The Commission *finds:*

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act and good cause exists for the Commission to enter upon a hearing on July 20, 1953, pursuant to the authority contained in Section 4 of such Act, concerning the lawfulness of United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and that said proposed sheets, with the exception of First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, be suspended as hereinafter provided and the use thereof deferred pending hearing and decision thereon.

(2) Good cause has not been shown for waiver of the 30 days' notice requirement of Section 4(d) of the Natural Gas Act with respect to First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39.

[fol. 93] (3) Good cause exists for further consolidating the proceeding involving the proposed increased rates and charges contained in the proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second

Revised Sheets Nos. 23, 31 and 39 with the proceedings in consolidated Dockets Nos. G-1142, G-1508, G-2049, G-2074.

(4) Good cause exists for fixing the date of hearing less than fifteen days after publication of this order in the Federal Register.

(5) It is necessary and appropriate to carry out the provisions of the Natural Gas Act, and it is in the public interest that the procedure hereinafter prescribed shall be followed at the hearing in order to conduct these proceedings with reasonable dispatch.

The Commission *orders:*

(A) A public hearing be held at 10:00 a. m. (EDST), on July 20, 1953, in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., concerning the lawfulness of the rates, charges, classifications, and service, subject to the jurisdiction of the Commission, as set forth in United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by the revised sheets described in Paragraph (B) hereof.

(B) The proceeding in Docket No. G-2210, involving United's First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and the proceedings in Dockets Nos. G-1142, G-1508, G-2049, and G-2074 be and they hereby are consolidated for purpose of hearings.

(C) Pending such hearing and decision thereon, United First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 118, 119, and 120, [fol. 94] and Second Revised Sheet No. 23, to its FPC Gas Tariff, Original Volume No. 1, be and the same are hereby suspended and the use thereof deferred until December 25, 1953, unless otherwise ordered by the Commission, and until such further time thereafter as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.

(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953.

(E) At the hearing United shall go forward first and shall present and complete its case-in-chief with respect to its FPC Gas Tariff, as amended by the revised sheets set

forth in Paragraph (B) above, before cross-examination is undertaken of United's presentations in the consolidated proceedings.

(F) Interested State commissions may participate as provided by Section 1.8 and 1.37(f) [18 CFR 1.8 and 1.37(f)] of the Commission's Rules of Practice and Procedure.

By the Commission.

Leon M. Fuquay, Secretary.

Adopted: July 10, 1953

Issued: July 10, 1953

[fol. 95] Before Federal Power Commission

Dockets Nos. G-1142, G-1508, G-2019, G-2074 and G-2210

In The Matter of United Gas Pipeline Company

Petition of Mobile Gas Service Corporation for Leave to Intervene

Your petitioner Mobile Gas Service Corporation, respectfully represents that:

1. Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Alabama, with its principal office of business in the City and County of Mobile, Alabama, and is a public utility, owning and operating a plant and distribution system for the purchase, sale and distribution of natural gas in the Cities of Mobile, Prichard, Chickasaw, Mobile County, Alabama, and their environs, including the villages of Whistler, Spring Hill and Brookley Field, and others, and has been so engaged for many years.

2. The names, title and post office addresses of the persons to whom correspondence or communications in regard to this petition are to be addressed are:

Maurice White, President, Mobile Gas Service Corporation, 182 St. Francis Street, Mobile, Alabama, and Sam M. Johnston, Attorney, P. O. Box 550, 804 First National Bank Annex, Mobile, Alabama.

3. The Corporation purchases all of its natural gas re-

quirements from United Gas Pipe Line Company (hereinafter called "United"), the Applicant for increased rates [fol. 96] in Docket Nos. G-1142, G-1508, G-2019, G-2074 and G-2210. Such proposed increased rates will increase the demand charge to Petitioner from 23 cents per MCF to 25 cents per MCF. The charge for excess gas deliveries will increase from 14 cents per MCF to 16½ cents per MCF; and such proposed rates will increase the charge for gas sold to its customer, Ideal Cement Company, from 10.7 cents per MCF to 14.5 cents per MCF.

4. Petitioner has a material and substantial interest in supplying of gas to consumers in its service area. It is not adequately represented by existing parties to this proceeding, and its interest may be adversely affected by the Commission's action therein.

Wherefore, Petitioner respectfully prays that your Honorable Commission will authorize its intervention in the consolidated proceeding and permit it to be made a party thereto; permit it to introduce evidence with reference to the matters pertinent to the proceedings; to cross-examine witnesses; and to take such other and further steps as will enable said petitioner to protect its interest and the interest of the public being served by it.

Respectfully submitted, Mobile Gas Service Corporation, By (S.) Maurice White, President.

State of Alabama,
County of Mobile, ss:

Maurice White, of full age, being duly sworn according to law, upon his oath says:

That he is President of Mobile Gas Service Corporation, the petitioner herein, and that he is authorized by said petitioner to verify and file with the Federal Power Commission [fol. 97] this said petition; that he has carefully examined all the statements contained in said petition and that all of said statements and matters set forth therein in behalf of the petitioner are true and correct to the best of his knowledge, information and belief.

(S.) Maurice White.

Sworn and subscribed to before me this 16th day of July, 1953. (S.) Laura G. Finch, Notary Public, Mobile County, Alabama.

Before the Federal Power Commission

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

Before Jerome K. Kuykendall, Chairman; Nelson Lee Smith and Dale E. Doty, Commissioners.

In the Matter of United Gas Pipe Line Company

Order Permitting Intervention

On July 16, 17, and 20, 1953, Tyler Gas Service Company, of Tyler, Texas, Mobile Gas Service Corporation, and Mississippi Valley Gas Company, respectively, filed petitions to intervene in the above-entitled proceedings. No answers or protests to such petitions have been filed.

The Commission *finds*:

(1) Although the petitions were not filed within the time required by Section 1.8 of the Commission's Rules of Practice and Procedure, good cause exists to permit the filing. [fols. 98-100] (2) The participation of petitioners may be in the public interest.

The Commission *orders*:

The above-named petitioners be and they hereby are permitted to become intervenors in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, That the participation of such intervenors shall be limited to matter affecting asserted rights and interests specifically set forth in their petitions for leave to intervene; and *Provided, further*, That the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order of the Commission entered in this proceeding.

By the Commission. J. H. Gutride, Acting Secretary.

Adopted: August 12, 1953.

Issued: August 14, 1953.

[fol. 101] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

TYLER GAS SERVICE COMPANY, ET AL., Plaintiffs

versus

UNITED GAS PIPE LINE COMPANY, Defendant

Civil Action No. 1662

Thomas B. Rainey, of Tyler, Texas; and Bryan Rea, Jr., of Washington, D. C.; for Plaintiff Tyler Gas Service Company.

Troy Smith, of Tyler, Texas; for Plaintiff City of Tyler.

Thomas Fletcher, of Houston, Texas; for Defendant.

MEMORANDUM OPINION—December 29, 1953

The two plaintiffs seek the intervention of the equitable powers of this Court to restrain the defendant from filing a contemplated pleading in a proceeding now pending before the Federal Power Commission. Tyler Gas Service Company (Tyler Gas), a corporation chartered under the laws of this State, is a local natural gas distributing company, selling at retail to the resident of Tyler, Texas. The City of Tyler (City) is a municipal corporation likewise chartered under the laws of Texas, with a population of [fol. 102] some 40,000 persons. United Gas Pipe Line Company (United) is a Delaware corporation engaged in the transportation and sale of natural gas in interstate commerce for resale. As such, it is a "Natural-Gas Company" within the terms of the Natural Gas Act of 1938 (15 U.S.C.A. 717, et seq.).

Tyler Gas has been purchasing its gas from United since 1940 under the terms of a written contract and several amendments thereto. United has applied to the Federal Power Commission for an increase in rates considerably in excess of those presently in force, and this controversy results from efforts of Tyler Gas and City to restrain the impending institution of such proposed rate schedule.

The facts, which are largely without dispute, arise in the following fashion. The original contract between United

and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet (Mcf), for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with a proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these [fol. 103] facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the

event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in com- [fol. 104] pliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

About July 1, 1952, United filed with the Commission a schedule of rates [1] (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff, United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the

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[1] Referred to as "Conversion rates," as it served to convert United's schedule of rates from contract form to tariff form. Such a change in form was required by rules of the Commission.

conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

On June 24, 1953, United filed with the Commission another revision of its schedule of rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf; and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

Upon the filing of the new proposal, by order of July 10, [fol. 105] 1953 the Commission set a hearing for July 20, 1953 to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210; "In the Matters of United Gas Pipe Line Co.") in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until December 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expires December 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for sale of industrial gas; hence its effective date was fixed at July 25, 1953.

The initial hearing was held July 20, 1953, as scheduled. Some testimony was taken, and the hearing was then adjourned to be reconvened at a later date. At the present time, it has not been so reconvened. As it appears that United's entire rate structure throughout several states is at issue before the Commission, in all probability the final determination will be long delayed.

Thus plaintiffs say that, come December 25, 1953, United proposes, pursuant to said Section 4(e), to file its motion

as contemplated thereby, moving the Commission to permit the proposed schedule to go into effect; that on that date the five-month suspension period permitted the Commis- [fol. 106] sion by terms of the statute will have expired; and thereafter it will have no discretion but to permit the increase. While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act.

Federal jurisdiction exists by reason of diversity of citizenship and amount in controversy, as alleged. Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs have made a case calling for the exercise of the equitable powers of the Court. The briefs which have been filed by counsel for all parties have been most helpful in the consideration of this question. They fail to disclose any authority directly in point; but from the principles which are clearly established by the authorities I am convinced that the relief prayed for may not be granted.

It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an over-simplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory, because to permit such utility to charge and collect rates which are confiscatory of its own property would jeopardize [fol. 107] its ability properly to serve the public in the future (Union Dry Goods Co. v. Georgia Pub. Serv. Co., 248 U. S. 372, and cases there cited).

Thus the rate-fixing provision of the United-Tyler Gas

contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (Colo. Interstate Gas Co. v. Fed. Power Comm., 142 Fed. (2d) 943, aff. 324 U. S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co., 162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784).

So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable—and hence lawful—is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

While I think it clear that the utility, despite its contract to the contrary, may apply to the appropriate governmental [fol. 108] agency for a review of its rate structure, it is equally clear that such utility may not, by purely unilateral action, and without pursuing the statutory method to secure review by the regulatory body, disregard its current contract rates and initiate higher ones (Southern Util. Co. v. City of Palatka, 268 U. S. 232). Plaintiffs contend that the action of United should be so characterized here, and that it should not, during the long interval while the Commission has the matter under consideration, be permitted to collect rates which the Commission has not approved, and which represent only United's own estimate of the rates which it would be just and reasonable for it to collect. The proposed sched-

ule actually is United's "asking price", and in all probability on final determination by the Commission will be whittled down substantially. The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. v. Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the Statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." (Emphasis added). It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary".

[fol. 109] Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief.

The fact that the so-called "contract rates" a eed upon between the parties here at all times are subjec o the approval of, and to modification or change by, the Commission is illustrated by the institution of the new "conversion rates" directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months. During that period when the contract rates were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received

their vitality and breath of life from the fact that the Commission permitted such contract to be filed and ordered such rates into effect until further notice. By the order which accomplished this result (plaintiffs' Exh. 19), the Commission was careful to provide that such action should not "be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate".

Adopting the view as outlined above, and by reason of my desire to file this memoranda as soon as possible, I forego the consideration of a number of other questions presented by the pleadings. Among these are certain questions raised by the presence of the City of Tyler. The plaintiffs contend [fols. 410] that United was a party to a contract not only with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946 to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12c rate. But I think that the presence of City here as a plaintiff does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not stop itself by reason of its conduct toward the City from taking the same action.

As I view the case, it is not necessary to determine the right of the City to enter into a contract (which United questions). Neither the Federal Power Commission nor many other persons enumerated by United are indispensable parties, whose presence would be required to confer jurisdiction on the Court. Having jurisdiction, I conclude that the plaintiffs do not show grounds for equitable relief, and the action will be dismissed for that reason.

Counsel were notified December 23, 1953 of this ruling. The Clerk will file the foregoing and furnish counsel a copy

thereof. This memoranda is adopted as Findings of Fact and Conclusions of Law under Rule 52.

Counsel for defendant will submit order within ten (10) days.

Done at Houston, Texas, this 29th day of December, 1953.

(S.) Ben C. Connally, Judge.

[fol. 110a] [File endorsement omitted.]

[fol. 111] Supplemental Appendix to Intervener's Brief—Filed May 6, 1954.

Original Contract.

This Agreement made and entered into as of the first day of January, 1936, by and between United Gas Public Service Company, a Delaware corporation, having a permit to do business in Alabama, hereinafter called "Seller," and Mobile Gas Service Corporation, an Alabama corporation, hereinafter called "Buyer."

Witnesseth: Whereas, Buyer owns a franchise for the distribution and sale of gas in the City of Mobile, Alabama and owns and operates a distribution system in said city and in the vicinity thereof, for the purpose of selling and distributing gas; and

Whereas, Seller has a supply of natural gas available for delivery to Buyer and Buyer desires to purchase natural gas from Seller for its entire requirements for sale and distribution in the City of Mobile, Alabama and in the contract area (as hereinafter defined) thereof, and Seller is willing to sell and deliver natural gas to Buyer for such purposes in the amounts and on the terms and conditions hereinafter provided;

Now, Therefore, in consideration of the mutual covenants and obligations herein contained, the parties hereto hereby covenant and agree as follows:

I

Subject to the terms, conditions and limitations hereinafter set forth, Seller agrees to sell and deliver or cause to

be delivered to Buyer and Buyer agrees to purchase and receive from Seller and pay Seller for (a) all natural gas [fols. 112-118] necessary to meet the requirements of the various consumers supplied or to be supplied by Buyer through its distribution system as now constructed and as the same may be hereafter extended, in the City of Mobile, Alabama, and in the contract area, as hereinafter defined, (b) lost and unaccounted-for gas and (c) all natural gas required by Buyer for its own use. The term "contract area," as herein used, is defined to mean (1) the entire territory included within the corporate limits of each of the municipalities of Mobile and Prichard, Alabama; (2) the entire territory included within a zone contiguous to and completely surrounding the corporate limits of the municipality of Mobile, Alabama, which zone shall be two miles in width in all directions from said corporate limits; and (3) all territory outside of the corporate limits of the City of Mobile and Prichard now being served by the Buyer, including the following villages and or unincorporated towns, whether being served or not; Spring Hill, Crichton, Toulminville, Plateau, Magazine Point, Chickasaw, and Whistler.

[fol. 119] VI

The prices to be paid by Buyer to Seller for natural gas delivered hereunder, during the period commencing at seven o'clock (7:00) A.M., on the first day of January, 1936 and ending at seven o'clock (7:00) A.M., on the 15th day of September, 1945, shall be as follows:

A—Domestic Gas

For natural gas sold and delivered by Seller to Buyer for distribution and sale to its domestic customers (as said term is hereinafter defined):

For the first two thousand (2,000) cubic feet per active domestic meter per month, forty-five cents (45¢) per one thousand (1,000) cubic feet.

For all over two thousand (2,000) cubic feet per active domestic meter per month, thirty-five cents (35¢) per one thousand (1,000) cubic feet.

By the term "active domestic meter," as used herein, is meant (for any month) any meter through which any

domestic customer shall have taken gas from Buyer during such month and has been billed for such gas by Buyer.

B—Industrial Gas

For natural gas sold and delivered by Seller to Buyer for distribution and sale to its industrial customers:

For gas sold under fifteen cents (15¢) net per one thousand (1,000) cubic feet, eighty-six and two-thirds per cent (86⅔%) of the net selling price.

For all gas sold at	15¢	net per 1,000 cubic feet,	13¢ per MCF
"	15.5	"	13.375¢ "
"	16.0	"	13.75 "

[fol. 120]

"	16.5	"	14.125 "
"	17.0	"	14.50 "
"	17.5	"	14.875 "
"	18.0	"	15.25 "
"	18.5	"	15.625 "
"	19.0	"	16.00 "
"	19.5	"	16.375 "
"	20.0	"	16.75 "
"	20.5	"	17.075 "
For all gas sold at	21.0¢	net per 1,000 cubic feet,	17.4¢ per MCF
"	21.5	"	17.725 "
"	22.0	"	18.05 "
"	22.5	"	18.375 "
"	23.0	"	18.7 "
"	23.5	"	19.025 "
"	24.0	"	19.35 "
"	24.5	"	19.675 "
"	25.0	"	20.0 "
"	25.5	"	20.2 "
"	26.0	"	20.4 "
"	26.5	"	20.6 "
"	27.0	"	20.8 "
"	27.5	"	21.0 "
"	28.0	"	21.2 "
"	28.5	"	21.4 "
"	29.0	"	21.6 "
"	29.5	"	21.8 "
"	30.0	"	22.0 "
"	30.5	"	22.15 "
"	31.0	"	22.3 "
"	31.5	"	22.45 "

For all gas sold at	21.0c net per 1,000 cubic feet,	17.4c	per MCF
"	32.0 "	22.6	"
"	32.5 "	22.75	"
"	33.0 "	22.9	"
"	33.5 "	23.05	"
"	34.0 "	23.2	"
"	34.5 "	23.35	"

[fol. 121]

"	35.0 "	23.5	"
"	35.5 "	23.65	"
"	36.0 "	23.8	"
"	36.5 "	23.95	"
"	37.0 "	24.1	"
"	37.5 "	24.25	"
"	38.0 "	24.4	"
"	38.5 "	24.55	"
"	39.0 "	24.7	"
"	39.5 "	24.85	"
"	40 and over "	25.0	"

For all gas sold to industrial customers, (exclusive of commercial heating customers) using under one hundred thousand (100,000) cubic feet for any single customer in any one month, thirty (30) cents per thousand (1,000) cubic feet.

In determining the price at which gas is sold by Buyer to its industrial customers all demand charges (but no minimum bill nor service charges nor forfeited discounts) shall be proportioned over the gas sold in each rate block and the net sale price so determined for each rate block for each customer shall fix and determine the price to be paid by Buyer to Seller for the quantities sold by Buyer to each industrial customer in each rate block in accordance with the above schedule. For gas sold by Buyer to its industrial customers at net rates intermediate between those shown in the above schedule the price shall be deemed to be the nearest price shown in the above schedule.

In consideration of the schedule of rates to be paid by Buyer to Seller as above provided, it is agreed that Buyer shall not contract to sell any natural gas at a step in the rate of less than twenty (20) cents per thousand (1,000) cubic feet without the consent in writing of Seller.

[fol. 122] C—Unaccounted for Gas

For all unaccounted-for gas twenty-three (23) cents per thousand (4,000) cubic feet.

D—Definitions

The term "domestic customer" is defined to mean any single consumer using natural gas in any place for any purpose in an amount up to but not exceeding fifty thousand (50,000) cubic feet in any month and the purchase price for natural gas for domestic customers hereby established shall apply to all natural gas used by such consumer during each month.

The term "industrial customer" is defined to mean any single consumer using natural gas in any place for any purpose in an amount exceeding fifty thousand (50,000) cubic feet in any month and the purchase price for natural gas for industrial customers hereby established shall apply to all natural gas used by such consumer during each month; provided, however, that any single consumer using natural gas for commercial heating in an amount less than fifty thousand (50,000) cubic feet in any month shall be considered an "industrial customer," as herein defined, for all purposes.

The term "unaccounted-for gas" is defined to mean the difference between the quantity of natural gas sold and delivered by Seller to Buyer and the quantity of natural gas Buyer delivers through its pipe lines to its domestic and industrial consumers.

If at any time during the term hereof the natural gas delivered hereunder shall average for a period of thirty (30) days a heating value of less than 900 BTU per cubic foot of dry gas corrected to the unit of measurement provided in Article V hereof, then in such event the price to be paid for natural gas having such less heating value than 900 Btu per cubic foot thereafter delivered shall be fixed by mutual agreement of the parties hereto, and, in the [fol. 123-132] event the parties hereto fail to agree, such price shall be determined by three arbitrators who shall be chosen, and who shall function, and whose decisions shall be

binding upon the parties hereto in all respects as hereinafter provided in this Article VI.

The price to be paid by Buyer to Seller for natural gas delivered hereunder during the period commencing at seven o'clock (7:00) A.M. on the 15th day of September, 1945 and continuing until the termination of this agreement, shall be subject to the mutual agreement of the parties hereto, and if not so agreed to by the parties hereto at least six (6) months prior to the 15th day of September, 1945, said rates for natural gas deliverable hereunder during the remainder of the contract period shall be determined by a board of three arbitrators to be selected as follows:

[fol. 133-134] SUPPLEMENT No. 7

THIS AGREEMENT made and entered into this 17th day of October, 1941, by and between United Gas Pipe Line Company, a Delaware corporation, and Mobile Gas Service Corporation, an Alabama corporation,

WITNESSETH:

[fol. 135] 2

All of Article VI of said contract of January 1, 1936, shall be and is hereby eliminated from said contract from and after the effective date hereof, and there shall be and is hereby substituted in lieu of said Article VI of said contract the following new Article VI, to-wit:

"VI

During the period of this agreement beginning on July 1, 1941 and ending July 25, 1947, the price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder shall be as follows:

[fol. 136] (A) Domestic Gas:

For all gas delivered by Seller to Buyer for resale and distribution to Buyer's domestic consumers thirty cents (30c) per thousand cubic feet.

The amount of domestic gas delivered hereunder during

any month (being the gas to which the above mentioned rate is applicable) shall be the total volume of gas billed for such month by Buyer to its residential consumers plus the total volume of gas billed for such month by Buyer to its commercial and other consumers whose individual average rate from Buyer for such month is thirty seven and one-half cents (37½¢) or more per thousand cubic feet.

(B) Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial consumers, eighty per cent (80%) of the proceeds received or receivable by Buyer therefor from each such industrial consumer without deduction for unpaid accounts; provided, however, that Seller shall receive not less than sixteen cents (16¢) per thousand cubic feet for each thousand cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its consumers, except domestic gas as defined above, and except special industrial gas as hereinafter defined, shall be classified as industrial gas, to which the rates provided in this Subdivision (B) shall apply.

[fols. 137-138] (C) Special Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose annual fuel requirements are in excess of five hundred million (500,000,000) cubic feet of gas, and to industrial customers to whom delivery of gas is made by Buyer through separate facilities not a part of Buyer's general distribution system, ninety per cent (90%) of the proceeds received or receivable by Buyer therefor from each such special industrial customer without deduction for unpaid accounts; provided, however, that Seller shall receive not less than sixteen cents (16¢) per thousand cubic feet for each thousand cubic feet of such gas except in such cases, if any as Seller may consent in writing to a lesser amount.

[fol. 139] In computing the amounts received or receivable by Buyer under Subdivision (B) above, all demand charges (but not minimum bills, service charges, forfeited discounts, receipts from tax adjustment clauses, etc.) shall be included.

In computing the amounts received or receivable by Buyer under Subdivision (C) above, all demand charges, minimum bills, service charges and forfeited discounts shall be included.

Any tax received or receivable by Buyer through the medium of a valid tax adjustment clause in its rate schedules which by agreement between the parties hereto is to be collected for Seller shall be paid to Seller, and the Buyer shall retain any taxes collected for its benefit.

If at any time during the term hereof the natural gas delivered hereunder shall average for a period of thirty (30) days a heating value of less than 900 Btu per cubic foot of dry gas corrected to the unit of measurement provided in Article V hereof, then in such event the price to be paid for natural gas having such less heating value than 900 Btu per cubic feet thereafter delivered shall be fixed by mutual agreement of the parties hereto, and, in the event the parties hereto fail to agree, such price shall be determined by three arbitrators who shall be chosen, and who shall function, and whose decisions shall be binding upon the parties hereto in all respects as hereinafter provided in this Article VI.

The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after the expiration of the first period hereof ending July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior [fols. 140-145] to the beginning of each of such five-year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this article provided.

In the event no price has been agreed upon within twelve (12) months prior to the beginning of any five-year period to which the price is to apply, such price shall be determined in the following manner:

[fol. 146] SUPPLEMENT No. 9

This Agreement made and entered into this the 30th day of July, 1946, by and between United Gas Pipe Line Company, a Delaware corporation, hereinafter called "Seller"

and Mobile Gas Service Corporation, an Alabama corporation, hereinafter called "Buyer."

Witnesseth:

1.

Effective as of January 1, 1947 at seven o'clock (7:00) A. M.; Subdivisions (B) and (C) of Article VI of said contract of January 1, 1936, as heretofore supplemented and amended, shall be and are hereby changed and amended so that said Subdivisions shall, in their entirety, thereafter read as follows:

[fol. 147] "(B) Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose fuel requirements during the billing month in question are not more than 41,667,000 cubic feet of gas, eighty per cent (80%) of the proceeds received or receivable by Buyer therefor from each such industrial customer during such billing month, without deduction for unpaid accounts; provided, however, that Seller shall receive not less than 16c per one thousand (1,000) cubic feet for each one thousand (1,000) cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its customers, except domestic gas as defined above, and except special industrial gas as hereinafter defined, shall be classified as industrial gas, to which the rates provided in this Subdivision (B) shall apply."

"(C) Special Industrial Gas:

For all gas delivered by Seller to Buyer for resale to industrial customers whose fuel requirements during the billing month in question are in excess of 41,667,000 cubic feet of gas:

(1) Eighty per cent (80%) of an amount determined by multiplying the total amount of proceeds received or receivable by Buyer from each such special industrial customer during such billing month, without deduction for unpaid accounts, by a fraction, the

numerator of which shall be 41,667,000 and the denominator of which shall be the total number of cubic feet of gas delivered to such customer during such [fols. 148-152] billing month; and

(2) Ninety per cent (90%) of an amount determined by multiplying the total amount of proceeds received or receivable by Buyer from each such special industrial customer during such billing month, without deduction for unpaid accounts, by fraction, the numerator of which shall be the total number of cubic feet of gas delivered to such customer during such billing month minus 41,667,000, and the denominator of which shall be the total number of cubic feet of gas delivered to such customer during such billing month;

provided, however, that Seller shall receive not less than 16c per thousand cubic feet for each one thousand (1,000) cubic feet of such gas except in such cases, if any, as Seller may consent in writing to a lesser amount."

[fol. 153] SUPPLEMENT NO. 10 TO SUPPLEMENT NO. 7

Mobile Gas Service Corporation
P. O. Box 1130
Mobile 6, Alabama

June 28, 1946.

United Gas Pipe Line Company,
Shreveport, Louisiana.

GENTLEMEN:

We are purchasing natural gas from you for resale and distribution in the City of Mobile, Alabama, and in the territory immediately adjacent thereto under provisions of a contract dated January 1, 1936, between United Gas Public Service Company (to whose rights thereunder you have succeeded) and this Company, as amended by agreement dated October 17, 1941, between you and this Company.

Under the provisions of subdivision C of Article VI of said contract as amended, we are required to pay you for gas delivered to us for resale to special industrial consumers 90% of the proceeds received or receivable by us therefor from each such special industrial consumer without deduc-

tion for unpaid accounts; provided, however, that you shall receive not less than 16c per thousand cubic feet for each thousand cubic feet of gas except in cases where you may consent in writing to a lesser amount.

We have agreed to sell natural gas to Ideal Cement Company (referred to in this letter as Customer) for a period beginning upon the date gas is first delivered thereunder and ending ten years from and after the date upon which the delivery of gas is commenced, under either Rate Schedule B or Optional Rate Schedule SR-M #1, as hereinafter set out, which rates are such that the payment to you of 90% of proceeds received by us for gas delivered to Customer may result in the payment to you of less than 16c per thousand cubic feet for the gas delivered by you to us for resale to Customer. Said rate schedules are as follows, to-wit:

[fol. 154] Rate Schedule "B"

20.0c per MCF for the first one million cubic feet used each month;
18.0c per MCF for the next one million cubic feet used each month;
16.0c per MCF for the next twenty-eight million cubic feet used each month;
14.0c per MCF for all additional gas used each month.

The prices above set forth are subject to adjustment for BTU and for taxes, and subject to the payment of an annual minimum of $12,000.00, all as specifically provided for in said contract.

Optional Rate Schedule SR-M #1

15.0c per MCF when total deliveries are between 0 and 85,000 MCF per month;
14.0c per MCF when total deliveries are between 85,001 and 125,000 MCF per month;
13.0c per MCF when total deliveries are between 125,001 and 160,000 MCF per month;
12.0c per MCF when total deliveries are between 160,001 and 400,000 MCF per month;
11.5c per MCF when total deliveries are over 400,000 MCF per month.

The prices above set forth are subject to adjustments for BTU and for taxes, and subject to the payment of an annual minimum of $90,000.00, all as specifically provided for in said contract.

If and so long as the Rate Schedule B is applicable to said customer, we request that you agree to accept, so long as the Customer continues as a special industrial customer, 90% of the proceeds received by us from said Customer even though 90% of such proceeds may amount to less than 16c per thousand cubic feet for such gas, for all gas delivered by [fol. 155] you to us (during the period in which such Rate Schedule B is applicable to said Customer) and sold by us to said Customer under Rate Schedule B. If at any time during which said Rate Schedule B is applicable to said Customer, this Customer ceases to be a special industrial customer, but continues to use gas under said Rate Schedule B, we request that you agree to accept 80% of the proceeds received or receivable by us, without deduction for unpaid accounts, including all demand charges, but excluding minimum bills, service charges, forfeited discounts, receipts from tax adjustment clauses, etc., even though 80% of such proceeds may amount to less than 16c per thousand cubic feet for such gas. It is agreed that in computing the amounts received by us from said Customer under the above mentioned contract, during the period of time when said Rate Schedule B is applicable to said Customer and so long as the Customer continues as a special industrial customer, there shall be included all minimum charges, readiness-to-serve charges and any other charges made by us under said contract. The provisions of this particular paragraph are applicable only during the periods of time when said Rate Schedule B is applicable to said Customer.

If and so long as the Optional Rate Schedule SR-M #1 is applicable to said Customer, we request that you agree to accept 90% of the proceeds received by us from said Customer, even though 90% of such proceeds may amount to less than 16c per thousand cubic feet for such gas, for all gas delivered by you to us (during the period during which Optional Rate Schedule SR-M #1 is applicable to said Customer) and sold by us to said Customer under Optional Rate Schedule SR-M #1. It is agreed that in computing the amounts received by us from said Customer under the

above mentioned contract during the period that Optional Rate Schedule SR-M #1 is applicable to said Customer, there shall be included all minimum charges, readiness to serve charges, and any other charges made by us under said contract. The provisions of this particular paragraph are applicable only during the periods of time when said Op-
[fol. 156] tional Rate Schedule SR-M #1 is applicable to said Customer.

It is further agreed that the Customer become delinquent for sixty days or more in the payment of any bill due us, we will forthwith notify you of such delinquency and we will, upon request from you, immediately exercise our rights under our contract with said Customer and discontinue service and will use all diligence in attempting to collect the amounts due us.

We agree, if during the term of our contract with Customer the existing rate of any tax (as hereinafter defined) be increased or if any new tax be imposed, that we will, upon notice from you, use every reasonable means to collect said increase or new tax from Customer as contemplated in said contract, and will, to the extent collected from Customer, reimburse you for the increased amount paid by you for such increased or new tax on the gas delivered by you to us for resale to said Customer; and we will make similar reimbursements to you for each additional increase in any new tax hereafter imposed, paid by you on said gas, upon your furnishing us such proof of the validity of our reimbursing you therefor as may be required by any regulatory or other body having jurisdiction thereover.

If the rate of any such tax (except and other than the Louisiana State gas gathering tax imposed for a limited period under Act 132 of the Louisiana Legislature, regular session of 1944, effective on August 1, 1944) be decreased, you will credit us with the saving effected by you on such gas by virtue of such decrease.

We agree, upon being furnished by you periodically with a statement showing the amount of the increased tax paid by you during such period, to make payment to you of the amount of such increased tax as shown by said statement and as collected by us from the Customer.

It is agreed, however, that in the event the total amount of the increase in the tax on you plus any increase in the

[fol. 157] tax on our Company, as contemplated in our contract with Customer, is in excess of the amount which we are permitted, under Section VII of our contract with Customer to charge said Customer, then the portion of the increased tax on you, for which we will reimburse you, will be that proportionate part of said maximum amount we are permitted to collect from Customer, and do so collect, which the amount of the increase in the tax on you bears to the total amount of the increase in the taxes on you and our Company. For example: If any tax on you is increased three-fourths of one cent, and a tax on our Company is increased one-half of one cent, then we will reimburse you for three-fifths of one cent: Provided, however, that if as a result of such reisbursement you would receive less than 100% of the amount of such increased tax on you, you shall have the right, upon giving us 30 days notice in writing, to require us to cancel said contract with Customer; provided, further, however, that we may, at our election, continue our said contract with Customer in force by reimbursing you for 100% of the amount of the increased tax on you.

June 28, 1946.

We further agree that if our above-mentioned agreement to reimburse you be not approved by any regulatory or other body having jurisdiction thereover, after any such increase of taxes on you, then you may require us to cancel our contract with Customer by giving us 60 days written notice.

As used herein, the term "tax" shall mean any tax, license, fee or charge levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is based on the volume or value of the gas in question; and for the purpose of determining the reimbursement to be made by us to you, or the credit to be given by you to us hereunder in respect of taxes paid by you on such gas, any tax paid by any subsidiary or affiliate of your company and any tax which you, [fol. 158] under contractual obligation, refund to the person or company paying same, shall be considered to be paid by you.

If you agree, subject to the terms and provisions hereof,

that we shall pay you and you shall accept 90% of the proceeds received by us from customer, even though 90% of such proceeds may amount to less than 16¢ per thousand cubic feet of gas, for all gas delivered by you to us during the period hereinabove specified and sold by us to Customer under either of the rate schedules above set out, and if the other matters referred to herein are acceptable to you, please sign this letter in duplicate, returning a copy for our files, thereby constituting this letter an agreement between us.

Subject to our obtaining the approval of the Federal Power Commission, the foregoing is Agreed to and accepted this 30th day of July, 1946. United Gas Pipe Line Company, by M. A. Abernathy.

Yours very truly, Mobile Gas Service Corporation, by Maurice White, President.

[fol. 158a] [File endorsement omitted]

[fol. 159] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOBILE GAS SERVICE CORPORATION, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

PETITION TO REVIEW AND SET ASIDE ORDER AND ORDER OF THE FEDERAL POWER COMMISSION—Filed March 9, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices thereof:

Mobile Gas Service Corporation* herewith respectfully

* Herein sometimes called "Mobile" or petitioner.

petitions this Court to review the opinion and order of the Federal Power Commission** issued December 7, 1953

** Herein sometimes called "Commission" or respondent.

in Docket No. G-2227, entitled "In the Matter of Mobile Gas Service Corporation." The opinion and order is printed in the Appendix hereto (App. p. 1).

The Issue Presented

The issue sought to be reviewed can be simply stated: Does the Natural Gas Act render a duly filed contract for the purchase of natural gas at agreed rates for a term of years void *ab initio*, or merely voidable upon a finding that the contract contravenes the public interest?

[fol. 160] The Nature of the Administrative Proceedings Sought to Be Reviewed

Mobile is seeking review of an order of the Commission pursuant to which it has been deprived of its rights under a duly filed contract for the purchase of natural gas at an agreed rate over its objection and without any hearing or determination that the public interest required that the contract be abrogated.

Mobile is a public utility under the laws of Alabama distributing and selling natural gas to consumers in Mobile, Alabama and the surrounding communities and areas. Much of Mobile's business is in the resale of natural gas to industrial customers. It purchases its entire supply of gas for these resales from United Gas Pipe Line Company,* a natural gas company within the meaning of the Natural Gas Act (52 Stat. 821, 15 U.S.C., §717a(6)).

Mobile's purchases of gas from United are made pursuant to a contract entered into between Mobile and a predecessor to United in January, 1936, as modified by later agreements between Mobile and United in October, 1941 and July, 1946. These agreements as modified provide that for gas for resale to industry Mobile will pay United certain percentages of Mobile's proceeds from the resales, but in any event not less than 16c per MCF of gas unless United has agreed in writing to accept less than 16c. These contracts were filed with the Federal Power Commission as United's Gas Rate Schedule FPC No. 20 and Supplement Nos. 7 and 9 thereto.

In 1946 Mobile proposed to contract with Ideal Cement Company to supply it with natural gas for a period of ten years at a fixed rate of 12c per MCF. Mobile advised United of this proposal and requested that it accept the

* Herein sometimes called "United."

percentage of Mobile's proceeds from the resales to Ideal [fol. 161] provided for in its contract with Mobile even though this percentage would return United less than 16¢ per MCF, the minimum rate to which it was entitled by that contract.

On July 30, 1946 United agreed in writing to Mobile's request, and in reliance on this agreement by United, Mobile entered into the contract to supply gas to Ideal at 12¢ per MCF for ten years.* This contract was expressly approved by the Alabama Public Service Commission, and United's agreement to accept less than 16¢ per MCF for gas sold to Mobile for resale to Ideal * was duly filed with the Federal Power Commission as Supplement No. 10 to United's Gas Rate Schedule FPC No. 20, thus becoming the legal rate for such sales.

The percentage rates which United thus agreed to accept resulted in payments by Mobile to United at an actual rate of 10.7¢ per MCF for the gas which United supplied for resale to Ideal. In May, 1952 United replaced its percentage rates on file with the Federal Power Commission with its FPC Gas Tariff Original Volume No. 1, which substituted a flat rate of 10.7¢ per MCF for gas sold to Mobile for resale to Ideal. For the percentages provided for under the original United-Mobile-Ideal agreement. United informed Mobile that this filing was made in order to comply with a Commission requirement that all its rates be converted from a percentage basis to a dollars and cents basis.

Thus United's sales of gas to Mobile at 10.7¢ per MCF for resale to Ideal at 12¢ per MCF continued pursuant to the United-Mobile-Ideal contract until June 24, 1953. On that day United filed with the Commission a number of proposed increases in its rates for certain town border sales, including First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its Gas Tariff Original Volume No. 1, which provided for an increase from 10.7¢ to 14.5¢ per MCF in the rate to Mobile for resales to Ideal. The [fol. 162] Commission on July 10, 1953 issued an order

* Herein sometimes referred to as the United-Mobile-Ideal contract.

which stated, in part, that these increased rates and charges "* * * have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful'" and ordered these rates suspended pending a hearing as to their lawfulness. However, since Section 4 (e) of the Natural Gas Act prohibits the suspension of proposed increased rates for sales for resale for industrial use only, the Commission's order did not suspend the new rate to Mobile, but expressly permitted it to go into effect on July 25, 1953. Thus Mobile has been compelled since that date to pay 14.5¢ per MCF to United for gas which it is obligated to resell to Ideal Cement Company for 12¢ per MCF. The proceeding involving all of these rate increases sought by United was denominated Docket G-2210 by the commission and was ordered consolidated with a number of other proceedings already pending dealing with United's rates and charges.

In response to United's attempt to substitute this 14.5¢ rate to Mobile for the 10.7¢ rate agreed upon in their contract, Mobile, on August 4, 1953, filed its petition protesting United's action and asserting its contract rights.* Mobile contended that United could not, unilaterally and without Mobile's assent, abrogate the contract between them *by the mere filing of an increased rate;* that the contract was binding and effective unless and until the Commission found after a hearing that the contract was so unreasonable that the public interest required that it be abrogated. In its petition Mobile requested that United's filing of this increased rate be rejected by the Commission

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* Mobile's petition was originally filed in the pending consolidated proceeding, Document G-2210, *et al.* However, since Mobile's motion for permission to intervene in that proceeding had not been granted at the time of the filing, and since it was apparent that immediate relief could not be obtained in Docket G-2210, the petition was amended so as to request the assignment of a separate docket number. This request was granted and Mobile's petition was assigned Docket G-2227, which is the docket in which the order herein appealed from was issued. This proceeding was never ordered consolidated with the proceedings in Docket G-2210, *et al.*

[fol. 163] as unlawful. It also prayed that if the Commission would not reject United's filing it (a) order a hearing solely as to the lawfulness of United's filing of the increased rates and charges in violation of its contract with Mobile and (b) that it enter an order directing that United refund any portion or all of the increased rates or charges collected from Mobile (1) if the filing by United is unlawful or (2) if these rates are ultimately found to be unlawful.

United, on September 11, 1953, petitioned to intervene in this proceeding and interposed an answer to Mobile's petition in which it opposed all of the relief requested by Mobile and asserted, in substance, that its contract with Mobile was not binding or enforceable as against United's mere filing of the higher rate. On September 28th Mobile filed its reply to United.

Thereafter, no hearings or other proceedings took place in the matter (Docket G-2227) until on December 7, 1953 the Commission issued the order and opinion which is the subject of this Petition to Review.

That order is set out in full in the Appendix and therefore will not be repeated fully here (App. p. 1). Suffice it to say that the opinion and order deny all of the relief requested by Mobile and order the proceeding terminated and Mobile's petition dismissed. The Commission refuses to reject United's filing of the increased rate and says that the filing is proper and lawful and that rate increases may be initiated by a natural gas company only pursuant to Section 4 of the Natural Gas Act. The Commission thus holds in effect that a duly filed rate contract, such as that here in issue, is void *ab initio*.

The Commission likewise refuses to order United to refund the increased amounts collected from Mobile if the filing is illegal or if the increased rate is found to be unlawful. This relief is denied Mobile on the ground that because [fol. 164] the Commission is specifically prevented by the proviso in Section 4 (e) of the Natural Gas Act from ordering the suspension of rates for resale for industrial use only it is also without authority to order a refund in the case of such rates.

Finally, the Commission states that questions relating to the reasonableness of United's proposed increase in

rates and charges are already at issue in other pending proceedings and refuses to order a separate hearing solely as to the unlawfulness of United's filing. The Commission indicates that Mobile could be heard in Docket G-2210, but that proceeding deals only with the reasonableness of the proposed new rates, and not with the question of the reasonableness of United's existing contract. Thus Mobile is at one and the same time deprived of its contract rights and required to pay a confiscatory rate, without any finding or determination whatsoever that its existing contract with United is against the public interest. It is subjected to this action peremptorily, without a hearing and without even the protection of a bond or a refund order.

Being aggrieved by the Commission's order issued December 7, 1953 Mobile on January 6, 1954 filed with the Commission its petition for a rehearing. This petition was denied by the Commission in its order issued February 4, 1954*

Jurisdiction and Venue

The statute upon which venue and jurisdiction in this case are based is Section 19(b) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 831; 15 U.S.C. 717r (b)), the pertinent part of which reads as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [fol. 165] circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

United is a natural-gas company organized and existing under and by virtue of the laws of the State of Delaware and thus is located in the Third Circuit within the meaning

* This order is reprinted at page 8a in the Appendix.

of Section 19(b) of the Natural Gas Act. The facts upon which jurisdiction is based are briefly stated. United is a natural-gas company within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Commission. Mobile, the petitioner, is a party to the proceedings before the Commission wherein the Commission issued the order and opinion of December 7, 1953 hereinabove referred to relating to United, and Mobile is aggrieved by that order, since it is thereby deprived of its contract rights without a hearing, and is compelled to pay 14.5¢ per MCF for gas which it is obligated to resell for 12¢ per MCF. Within thirty days after the date of the order Mobile, pursuant to Section 19(a) of the Natural Gas Act, filed with the Commission its petition for rehearing. This application for rehearing of the Commission's opinion and order was denied by Commission order issued February 4, 1954 (App. p. 8a) and thus denied within the meaning of Section 19 of the Natural Gas Act. It is therefore apparent from the action by the Commission that this petition to review is filed within the sixty day period fixed by Section 19(b) of the Act.

[fol. 166] Grounds Upon Which Relief Is Sought

1. The Commission erred in refusing to reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 in so far as they apply to sales by United to Mobile for resale to Ideal. A rate contract which has been duly filed with the Federal Power Commission is not void *ab initio*, but is a valid, binding and enforceable contract until and unless modified or abrogated after a hearing and finding by the Commission that it is so unreasonable or otherwise so burdensome that the public interest requires that it be abrogated or modified. Such a contract rate cannot be repudiated by a mere *ex parte* filing under Section 4 of the Act of a proposed higher rate by one party to the contract. Such a filing, being unlawful and unauthorized by the Act, should be rejected, and the Commission's refusal to reject it has deprived Mobile of its property and rights without due process of law.

2. Having refused to reject the filing, the Commission erred in refusing to modify and amend its order of July

10, 1953 so as to provide for a hearing solely as to the lawfulness of the filing by United of the said revised sheets. The reason given by the Commission for such refusal; that all questions relating to the reasonableness of United's proposed new rates were pending before it in another proceeding affords no relief to Mobile, inasmuch as the only matters before the Commission in that proceeding are the reasonableness of such new rates, as distinguished from the reasonableness of Mobile's contract with United. If such new rates are found by the Commission to be reasonable, they will become the legal and effective rates, even though Mobile's contract may itself be perfectly reasonable. The effect of this refusal, therefore, is to deprive Mobile of any opportunity at any time to test the [fol. 167] lawfulness and reasonableness of its existing contract, and to compel it to pay a rate in excess of the contract rate without an opportunity to be heard.

3. The Commission erred in refusing to order that United make refund to Mobile of any portion or all of the increased rate collected from Mobile which may be determined to be illegal or to be unjust and unreasonable. As a result of this refusal by the Commission, Mobile may be compelled to pay rates which will later be found to be illegal, unjust or unlawful, without any opportunity to recover the same at any time, and to pay such rates before there has been any hearing or determination that they are legal, just or reasonable. Such a result is a deprivation of Mobile's property and rights without due process of law.

4. The Commission erred in dismissing Mobile's petition herein and in terminating the proceeding. Such dismissal and termination deprives Mobile of any opportunity to be heard as to its rights under its contract.

Conclusions

Wherefore, Petitioner prays:

1. That a copy of this petition be served forthwith upon a member of Respondent, Federal Power Commission, in accordance with Section 19(b) of the Natural Gas Act;

2. That Respondent, Federal Power Commission, be required, in conformity with Section 19(b) of the Natural

Gas Act and Rule 18(7) of this Court, to certify and file with this Court a transcript of the record upon which the order and opinion here sought to be reviewed were entered;

3. That petitioner be notified by the Clerk of this Court when said transcript has been received;

[fol. 168] 4. That this Court review the Commission's opinion and order issued December 7, 1953 and upon such review (a) reverse and set aside the said opinion and order; (b) order that the Commission reject the filing by United of its First Revised Sheet No. 40 and Second Revised Sheet No. 39; (c) and order that United be directed to refund to Mobile with interest all rates and charges collected by it from Mobile in excess of 10.7¢ per MCF for sales of natural gas for resale to Ideal.

5. That this Court exercise jurisdiction over the parties and subject matter of this petition and grant to petitioner such other and further relief as the rights and equities of the cause may require and as to the Court may seem just in the premises.

Respectfully submitted, Mobile Gas Service Corporation, by Winthrop, Stimson, Putnam & Roberts, Its attorneys: (S.) William C. Chanler, a member.

Winthrop, Stimson, Putnam & Roberts, Johnston, McCall & Johnston, Counsel for Mobile Gas Service Corporation.

Dated: March 8, 1954.

[fols. 169-178] *Duly sworn to by William C. Chanler, March 8, 1954. Jurat omitted in printing.*

[fol. 179] [File endorsement omitted]

[fol. 180] IN UNITED STATES COURT OF APPEALS

[Title omitted]

MOTION OF UNITED GAS PIPELINE COMPANY TO INTERVENE IN OPPOSITION TO THE PETITION FOR REVIEW—Filed March 16, 1954

To the United States Court of Appeals for the Third Circuit and the Honorable Justices Thereof:

United Gas Pipe Line Company (United) respectfully moves this Court for permission to intervene herein in opposition to the petition for review of Mobile Gas Service Corporation, Petitioner, and in support of the correctness and binding effectiveness of the orders of the Federal Power Commission sought to be attacked herein, and as required by Rule 18(6) of the Rules of this Court, shows as follows:

Nature of United's Interest

1. United is a natural gas company subject to the jurisdiction of Respondent under the Natural Gas Act, and the matters and issues sought to be raised herein by Petitioner involve United's rights, powers, and duty to Respondent, and Respondent's power, authority, and jurisdiction of matters confided to its administrative regulation by the Natural Gas Act, including the terms, conditions, and provisions of service and sale of natural gas by United to Petitioner, which service and sale is made pursuant to the provisions of the Natural Gas Act subject to the regulation of Respondent.

2. On or about January 1, 1936, United Gas Public Service Company, a predecessor of United, contracted with Petitioner respecting sale of natural gas, which contract, in [fol. 181] Article XV, among other things, provided:

> "All of the obligations of the parties hereunder shall be subject to the valid orders of all governmental bodies, both Federal and State, having lawful jurisdiction in the premises."

United succeeded to the rights, powers, and obligations of United Gas Public Service Company in said contract, which

was from time to time amended and supplemented, all of which, being subject to the jurisdiction of Respondent under the Natural Gas Act, have been filed with Respondent as required by its Rules and Regulations and permitted by Respondent to become effective, including the supplement or amendatory agreement particularly asserted by Petitioner dated June 28, 1946, filed with Respondent as Supplement 10 to Supplement 7 of United's Gas Rate Schedule FPC No. 20, United's signature to the last supplement being expressly conditioned upon the approval of Respondent.

3. Said contract as amended and supplemented was in all things superseded by United's filing on or about 3 July, 1952, of its Federal Power Commission Gas Tariff converting said contract into tariff form as required by the Rules and Regulations of Respondent, which conversion tariff, together with the service agreement supporting the same, was permitted to be filed by Respondent and thus became the only lawful basis for service and the rates and charges [fol. 182] to be made therefor lawfully chargeable by United to Petitioner for such service and sales covered by the said Tariff. Petitioner did not appeal from the Commission's order permitting the filing, which became final and was and is binding and conclusive upon United and Petitioner.

4. On 24 June, 1953, United filed with Respondent an application for increase of rates and charges covering certain town border sales and certain sales for resale to large industrial consumers, which would be inclusive of the gas alleged to be resold by Petitioner to Ideal Cement Company. This application was accepted for filing and docketed as Docket G-2210 on Respondent's docket by the order of July 10, 1953, mentioned in the petition, the increased rates for resale to industrial consumers were permitted to become effective without suspension as required by the basic Act, while all other proposed increases were suspended for the statutory five months period; and said Docket G-2210 was thereupon consolidated for hearing with Dockets G-1142, G-1508, G-2019 and G-2074, then pending and in course of hearing. Respondent ordered hearing upon such application to begin July 20, 1953 which was done; Petitioner sought leave to intervene which was granted, thereby authorizing and empowering Petitioner to present in the

record of said proceeding any evidence, if any, which it might have touching upon the right of United in Docket G-2210 to have said proposed increased rates finally established, and thus, was fully authorized and empowered to [fol. 183] present to Respondent any evidence, if any, which it might have bearing upon the issue whether such rates were just and reasonable and whether they should be finally authorized by Respondent. Said proceeding including Docket G-2210, which was thereafter recessed at order of Respondent, has now been by Respondent's order set for cross-examination and *hearing to be resumed* at the hearing rooms of Respondent in Washington, D. C. on *23 March 1954*. At expiration of the suspension, suspended rates became effective through the procedure provided by Section 4(e) of the basic Act with the customary statutory provision to protect refunds, if any are ordered by the final order in the proceeding.

5. Instead of availing itself of its right and permission to intervene and display and adduce before Respondent whatever grounds, rights or evidence, if any, it might have touching its several contentions respecting the rates involved, Petitioner sought deviation by filing an independent proceeding under the Docket No. of G-2227, and the making of a collateral attack upon the order of July 10, 1953, issued in Docket G-2210 in which it sought and was granted right to intervene. Pursuant to leave, United intervened in Docket G-2227 in opposition to Petitioner's application.

6. United therefore has a direct interest in the matters involved in this Petition for review, because it will be directly affected by the decision and rulings of the Court herein, and because the issues sought to be presented to this Court and upon which the decision of this Court will turn involve the rights, duties, and obligations of United under the Natural Gas Act both to Petitioner and to Respondent.

[fol. 184] Grounds Upon Which Intervention is Sought

1. Petitioner, before Respondent and by this Petition, contends:

(a) That a contract for a fixed term is superior to, and beyond the reach of, the regulatory authority of Respondent

which is claimed to be without power of regulation to change such *rate* unless first finding the *contract* contrary to the public interest under Section 5(a) of the Act, and that it is superior to, and beyond the reach of, Section 4(e) of the Natural Gas Act;

(b) That such contract presents a rate not subject to regulatory interference except after a proceeding under Section 5(a);

(c) That such contract prevents Respondent and United from performing and exercising their respective duties, rights, and obligations granted and imposed by the Natural Gas Act with respect to Section 4 of that Act; and

(d) That such contract requires Respondent, (contrary to the provisions of the Natural Gas Act), to reject without hearing an application lawfully filed under Section 4(e) of the Act.

2. Such contentions are without force and effect and are wholly without merit upon the following grounds:

[fol. 185] (a) No private contract may be validly made or enforced which purports, or is contended, to deprive, restrict, impair, or destroy any right or duty of a natural gas company or Respondent as required by the Natural Gas Act, and any and all contractual provisions at variance with any such right or duty are wholly unenforceable.

(b) United as a natural gas company subject to Respondent's regulatory jurisdiction may charge only just and reasonable rates which it has the duty under the Act, including Section 4(e) to propose for Respondent's approval or acceptance; and Respondent itself, or, on complaint of any of those persons specified in Section 5(a) of the Act, has the power to investigate and determine the reasonableness of rates: And such powers, rights, and duties of natural gas companies, their contractees, and Respondent, cannot be changed, altered, restricted, or destroyed by any contract or contractual provision between the natural gas company and any of its customers so that United and Petitioner, as a matter of law, were not and are not free validly to contract in derogation of any of the terms and provisions of the Natural Gas Act, or the exercise of rights and duties conferred or required by that Act either upon United or Respondent.

[fol. 186] (c) The original contract and all amendments and supplements thereto, the conversion tariff which superseded and replaced the contract and all the supplements thereto, and the application filed by United and docketed in Docket G-2210 are in all things subject to the Respondent's powers and duties under the Act, and may not be used to circumscribe, prevent, restrict, avoid, stalemate, or delay the free exercise and performance of the respective rights, duties, obligations, and powers granted and imposed by the Natural Gas Act upon United as a natural gas company, and Respondent as the administrator of the Act, and any such claimed to be so effective are inoperative, unenforceable, and invalid.

(d) Rate making and regulation by Respondent is a legislative function under the Act in no wise subject to private contractual obligation, and the respective rights, duties, and powers of United and Respondent under the Act, including Sections 4 and 5, are in every respect superior to contractual provisions.

(e) All contractual provisions and rates approved or merely accepted for filing by Respondent are subject always to the rights and duties of United, as a natural gas company and to Respondent under the Act, including Sections 4 and 5, to propose and fix just and reasonable rates.

[fol. 187] (f) Petitioner's contentions would have effect to annul and cancel applicability of Sections 4(d) and (e) of the Act to United, which would be against public policy, for one subject to regulation may not impair, interfere with or deviate regulation by contractual provisions having an effect to rescind and annul the application of a statute, or any part thereof.

(g) A filed rate, whether fixed or merely accepted for filing by Respondent, is the only lawful rate, and thus the rate filed in Docket G-2210 and permitted by the Commission to become effective pending hearing is the only lawful rate between United and Petitioner binding equally on both.

(h) The order of July 10, 1953, is a final, valid and binding order on Petitioner, sets up the only lawful rate which United may charge the Petitioner pending the hearing in Docket G-2210, is therefore conclusive upon Petitioner, and cannot be collaterally attacked by Petitioner in the inde-

pendent proceeding from which this appeal purports to be taken.

(i) The relief sought by Petitioner from Respondent and by this appeal if granted would require Respondent to act contrary to the ambit of authority granted by the Act. [fol. 188] (j) The petition to Respondent in Docket G-2227 and this petition for review show that requirements of due process have been fully complied with in that Petitioner had due notice pursuant to Respondent's Rules and Regulations of the pendency and identity of the subject matter of Docket G-2210, was permitted to intervene, and thus continues to have ample opportunity either to offer such evidence, if any, which it may have bearing upon the ultimate issue to be there decided, whether the rates proposed by United are just and reasonable.

3. United's Counsel is advised by Samuel M. Johnston, Esquire, of Johnston, McCall & Johnston, Attorneys of Record for Petitioner, and by Louis L. DaPra, Esquire, Attorney for Respondent, that there is no objection to this intervention by United.

Prayer

Wherefore, premises considered, United moves and prays:

1. That it be authorized and permitted by this Court to intervene in this cause in opposition to Petitioner and in support of the validity and correctness of the action and orders of Respondent.

2. That in accordance with Rule 18(6) it be permitted to participate in the designation of the record.

[fol. 189] 3. That it be permitted to file an answer to the Petition for Review within such time and upon such terms as this Court may designate.

4. That pursuant to the Rules of this Court it be permitted to participate in the briefing, oral argument, and submission of this matter.

5. For such other orders or directions as this Court may deem proper in the premises.

Respectfully submitted, United Gas Pipe Line Company, by Thomas Fletcher, Its Attorney.

Wilbert O. Crain, General Counsel; George D. Fiser, United Gas Building, 1525 Fairfield Avenue, Shreveport, Louisiana; Thomas Fletcher, Niels Esperson Building, Houston 2, Texas; C. Huffman Lewis, 1525 Slattery Building, Shreveport, Louisiana, Counsel for Intervener.

[fol. 190] *Duly sworn to by Thomas Fletcher March 15, 1954. Jurat omitted in printing.*

[fol. 191] Certificate of Service [Omitted in printing]

[fol. 192] In United States Court of Appeals for the Third Circuit

[Title omitted]

No. 11,280

Order Permitting Petitioner to Intervene—Filed March 17, 1954

Upon consideration of the motion by United Gas Pipe Line Company, and there being no opposition to the motion;

It is ordered that United Gas Pipe Line Company be, and it is hereby granted leave to intervene as a party respondent in the above-entitled case, to participate in the designation of the record, to file a brief, and to participate in the oral argument.

By the Court, Maris, Circuit Judge.

March 17, 1954

(File endorsement omitted)

[fol. 192a] [File endorsement omitted]

[fol. 193] In The United States Court of Appeals for the Third Circuit

[Title omitted]

No. 11,280

Motion of United Gas Pipe Line Company, Intervener, for Certification of Additional Material, Etc.—Filed April 15, 1954

[fol. 194] To the Honorable Judges of Said Court:

Intervener, United Gas Pipe Line Company (Herein called "United") moves the Court under Rule 18(7) for an order:

(a) Directing Respondent Federal Power Commission (herein called "Commission") to prepare a supplemental transcript of record to contain the matters listed in Exhibit "A" attached hereto and hereof made a part of this motion, certify to the same, and forward under such conditions and within such time as this Court may set; or

(b) For an order authorizing United to secure certified copies from the Commission of each and all of the matters set out in Exhibit "A" attached hereto and hereof made a part and then to file the same as a supplemental transcript of the record in this cause within such time and upon such terms as this Court may order; and

(c) For an order enlarging the time within which United may prepare and file its brief herein dependent upon the forwarding of the supplemental transcript of the record herein prayed for,

and in support thereof shows the following grounds:

By order of July 10, 1953, in Docket G-2210, the Commission accepted United's application for increased rates, and, pursuant to Section 4(e) of the Natural Gas Act, ordered increased city gate rates suspended, permitted increased rates for sale of gas to Mobile Gas Service Corporation, Petitioner, (herein called "Mobile") for resale for industrial use only to become effective pending the hear-

ing, and ordered Docket G-2210 consolidated for hearing [fol. 195] with Dockets G-1142, G-1508, G-2019 and G-2074. On August 4, 1953 Mobile instituted Docket G-2227, attacking the order of July 10, 1953, in Docket G-2210, and seeking in part certain cancellations, changes and modifications in said order as to gas for resale for industrial use.

The ultimate position of Mobile may be stated thus: Since Mobile asserts a contract with United for firm rates for gas for resale for industrial purposes only to Ideal Cement Company, United is without any power or right under the Natural Gas Act to comply with or perform the duties cast upon it by that Act with respect to rates, or their increase, and the Commission is without power under the Act to change or affect or regulate the rates set out in the claimed contract unless and until the Commission in a proceeding under Section 5(a) *first* finds that the *contract*, as distinguished from any rate obligation contained in the contract, is against public interest, and, so, orders it abrogated.

The record certified by the Commission does not contain the attacked order of July 10, 1953, or the relevant record reflecting either the context of filings and orders giving rise to the order of July 10, 1953, or the contractual papers constituting the foundation of Mobile's asserted right.

Demonstrating necessity and materiality of presence of Items in Exhibit "A" to a proper decision hereof, United says:

[fol. 196]

1.

The order of July 10, 1953, in Docket G-2210, attacked by the initiation of this cause, is not certified. Clearly consideration of that order and the context out of which it came is essential to full and balanced determination of whether that order is subject to the collateral attack made upon it. (Item 1, Exhibit "A").

2.

Federal Power Commission Rate Schedule No. 20, the basic contract. (Item 2, Exhibit "A").

This is the base contract claimed by Mobile. While executed prior to enactment of the Natural Gas Act, it is expressly made subject to all lawful and valid rules and regulations and orders of any state or federal agency having

jurisdiction. It thus contractually provided the caveat which the law would import in any event even before the exercise by the Congress of the delegated Federal power over interstate commerce. That contract is mentioned at Page 4 of Mobile's Petition in Docket G-2227; P. 2, Petition to Review.

Items 4, 6, 8, and 9 are supplements to said agreement, Item 6 being the particular consent letter so heavily relied on by Mobile. These contracts must be in the record for this Court to evaluate, weigh and measure what the contractural obligation actually was and its weight in the scales against the exclusive primacy of the regulation and administration under the Natural Gas Act delegated to the Commission.

[fol. 197] Items 3, 5, 7, 8-a, and all are orders by the Commission permitting such contracts and supplements to be filed and become effective. United's representative on April 13, 1954, was refused access to the records of the Commission to check these orders and was told to file a written application to the Commission for Commission consideration and possible order, which was admittedly not possible in United's effort to obtain submission of this motion by April 19, 1954; but upon information and belief United alleges that each of said orders will have this or similar language:

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rules, regulation or practice affecting such rate or service contained in your tariff; *nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith.*" (Emphasis supplied)

Relevancy on the claim of contractual superiority to statutory regulation and propriety of the Commission's order of July 10, 1953, and of December 7, 1953, upon which this appeal purports to be based, is manifestly materially affected by the determination and consideration of the effect

and result of such language and judicial position of the Commission.

The provisions in these orders are now carried forward by the Rules and Regulations of the Commission 18 C. F. R. 154.23 quoted by the Commission in the order of December 7, 1953, appealed from.

[fol. 198] 3.

United, under compulsion of Commission Rules and Regulations, filed a conversion tariff which converted to tariff form all contracts filed as rate schedules, including the contract and all 46 supplements and amendments with Mobile. This included the applicable tariff sheets 43 and 44 (Item 13) and a required statement pursuant to Section 154.85 (Item 12) listing the parts of the basic contract and all supplements and amendments thereto which could be retained in accordance with such Rules and Regulations as an executed service agreement. This filing was docketed by Commission as No. G-2019. It was combined with an application for increase of certain pipe-line rates and certain notices of cancellation affecting jurisdiction, (the latter two portions not pertinent here). The Commission's order of approval (Item 14) is conclusive. Mobile refers to this tariff in Paragraph 8, Page 7, Petition in Docket G-2227, and P. 3 of Petition to Review.

On the issue of claimed superiority of asserted contract right to any regulatory orders or authority of the Commission or United's rights and duties under the Natural Gas Act; when in this record, these matters, which had to be in contemplation of the Commission in its consideration of the proceeding at Docket G-2227, will demonstrate that the contract, which Mobile claims in its Petition to Review and in Docket G-2227 was inviolate, had, as a matter of law, [fol. 199] already been superseded and replaced by the conversion tariff, obligatory under Commission Rules and distinctly different in content and effect from the contract claimed. Thus, the posed question of "abrogation" was moot even before United filed, at G-2210, the application for increase in industrial rates permitted to become effective pending hearing by the order of July 10, 1953, at which Mobile's proceeding in G-2227 was aimed.

To determine whether consent of the parties could be obtained to this motion, the writer telephoned the Hon. William C. Chanler, Counsel for Mobile, and advised that Items 12, 13, and 14 would be included and the position of United thereon, and was then advised by Mr. Chanler that opposition would be urged on the ground that United was reputed to have advised Mobile that the conversion tariff did not affect it and could be ignored, or words of similar purport. The writer has found no evidence of such a representation in diligent efforts made since the call on the morning of Tuesday, April 13, 1954, but has found and attaches hereto as Exhibit "B" a letter from United to Mobile of May 29, 1952, forwarding the filing of the conversion tariff, including the statement made pursuant to Section 154.85, which on its face showed that only portions of said contract were being retained as required by the Rules and Regulations of the Commission. United suggests that the filing of [fol. 200] a conversion tariff required by the Rules and Regulations of the Commission which rendered abandonment of a contract as such compulsory and the conversion to tariff form obligatory, and which permitted, as required by the Rules, only certain portions of the contract to be retained as a service agreement: had a result in law beyond the power of United to affect, obviate, avoid, weaken, or prevent. Such legal result flowing from compliance with Commission Rules and Regulations is inescapable, for if compliance with the Rules and Regulations of the Commission and the filing of the statement (Item 12, Exhibit "A"), copy of which marked Exhibit "D" is attached, at law superseded said contract; any representation by United of a contrary legal result would not over-come the legal actual notice visited by Exhibits "B" and "D", nor could it restore a contractural situation changed, outmoded and prohibited by the Rules and Regulations and order of the Commission. United thus submits that the filing of the conversion tariff, and the order of the Commission permitting the filing, are necessary and vital parts of the record, essential to a proper and correct determination of the validity of the order of July 10, 1953, and the Commission's repudiation of Mobile's attack upon that order by the proceeding in Docket G-2227.

In the order permitting the conversion tariff to become

effective (Item 14, Exhibit "A") issued in Docket G-2019, paragraph (D) contained substantially the same caveat recorded on Page 4. Thus, the Commission carried forward [fol. 291] its refusal to approve a contractural provision in accordance with Mobile's interpretation or contention as being sacrosanct and superior to regulatory control under the Natural Gas Act.

4.

As pointed out, the order of July 10, 1953, issued in Docket G-2210 and also in the other Docket Nos. G-1142, G-1508, G-2019, and G-2074, with which G-2210 was then consolidated, suspended certain rates not pertinent here, and with respect to the industrial rates of which Mobile complains, ordered in Paragraph "B":

> "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40, and Second Revised Sheets Nos. 31 and 39, be and the same hereby are permitted to become effective on July 25, 1953."

Second Revised Sheet No. 39 and First Revised Sheet No. 40 applicable to Mobile (Item 15(a)(b), Exhibit "A" attached) are referred to and alleged in paragraph 9 of Mobile's petition in G-2227. It was for this portion of the order of July 10, 1953, that Mobile sought substitutions, modifications, and changes, and made attack upon the order of July 10, 1953. Thus such revised sheets, together with the letter notice from the Commission to Mobile (Item 16, Exhibit "A") of the filing of the application in Docket G-2210, the order of the Commission (Item 17, Exhibit "A"), the petition of Mobile for leave to intervene in the [fol. 292] consolidated docket, and the Commission's orders thereabout (Items 18 and 19, Exhibit "A" attached hereto) alleged in paragraph 11 of Mobile's Petition are essential and necessary so that this Court can have the context of the order attacked and thus be in a position with relevant and material record before it to weigh the respective contentions of the parties hereto to Mobile's Petition to Review affecting its effort to have the Commission recall, modify and substitute orders for the order of July 10, 1953.

In Mobile's Petition to Review, it is alleged that the order in Docket G-2227 deprived Mobile of its contract rights

without a hearing (P. 7, Petition), deprived it of its property rights without due process of law (P. 8, Ground One, Petition), deprived it of an opportunity to test the lawfulness and reasonableness of its existing contract, compelling it to pay an increase rate in excess of the contract rate without opportunity of hearing (Ground Two, P. 8-9, Petition); and that the Commission's refusal in the teeth of Section 4(e) of the Natural Gas Act to require that United refund Mobile any portion of the industrial rate increase found not to be just and reasonable was a deprivation of property and rights without due process (Ground Three, P. 9, Petition), and the repetition in Ground Four (P. 9, Petition) of no opportunity to be heard, all are shown to be without foundation, because the granted right to intervene and participate in G-2210 and the other consolidated dockets [fol. 203] thereabout (Items 15, 16, 17 and 19) show:

(a) That Mobile was permitted to intervene with the right to adduce any evidence in its possession as to why the proposed rates were unjust and unreasonable, which necessarily would include the right to offer any evidence, if any it had, as to why the so-called "contract rates" were the maximum, just and reasonable rates; but because they were just and reasonable and not because they were contained within a contract;

(b) Would show that it had full opportunity to be heard both in contest and in affirmative offerings;

(c) Would give it freedom to contend, if it was so advised, that its contract continued to give it rights even though superseded by the filing and operation of the conversion tariff as required by the Rules and Regulations of the Commission;

(d) That Mobile so recognized by its application to intervene, and also by the fact that it sought at first to file its application in the consolidated cause before it separately filed it under the heading of Docket G-2227;

(e) That such items taken with Item 11 being a general rate investigation initiated in 1948 by the Commission covering all of United's rates, gave to Mobile as a participant in the consolidated proceeding all

rights to participate and be heard which it could possibly expect

Is this Court to be asked to declare a denial of right when the records, if properly before this Court, refute denial?

From the foregoing it is obvious that Mobile sought and was given full opportunity to be heard, which opportunity continues to exist in the consolidated proceedings now in [fol. 204] course of hearing, in which it is free to present such evidence, if any it may have, touching the issue as to whether the rates proposed and sought by United in Docket G-2210 are just and reasonable, as well as to offer evidence upon what rates, if any, Mobile contends and believes are just.

The position of the Commission is understood to be that the certified matters were the only matters before it in issuing the order denying Mobile's petition, but it is submitted that a mere examination of the scope and range of the matters listed, relied upon, and taken into consideration in the assertion and decision of the issues as shown by Mobile's Petition, its supporting memo, United's Petition in Intervention and Answer, Mobile's Reply, and the Commission's order of December 7, 1953, (P. 1, 24, 50, 65, 75, Certified Record) and the order of July 10, 1953, attacked in Mobile's Petition but not certified, copy of which marked Exhibit "C" is attached hereto; show specific reliance, basis of contention, and basis of decision to have included each and all of the items listed in Exhibit "A" attached to this motion, with all of which the Commission has judicial knowledge and familiarity, and obviously the purport and effect of all of such items, considered in the light of, and in their proper place under, the Natural Gas Act and the Commission's administration thereof, were an integral, structural part of the foundation from which the Commission proceeded to the order of December 7, 1953.

[fol. 205] It is thus respectfully submitted that the items listed in Exhibit "A" attached hereto are thus shown and are clearly demonstrated to have such relevance and materiality as that their absence from this record deprives this Court of the necessary material upon which mature and just consideration can be given to the issues and contentions raised in this proceeding, and in the absence of which

such issues cannot be with balance, justness, forthrightness and completeness determined.

5.

United is authorized by the Hon. William C. Chanler, Counsel for Mobile, to say that the five days' notice under Rule 30(1) will be waived; and further is authorized to say that he will notify the writer by long distance phone by Friday, April 16, 1954, whether Mobile will consent for this motion to be submitted upon the motion and answer without necessity of oral argument, at which time the writer will notify the Clerk of this Court by long distance phone. If Mobile desires oral argument, it is agreed that the motion be upon the motion calendar of this Court for Monday, April 19, 1954.

6.

The writer is authorized by the Hon. Louis DaPra, Counsel for the Commission, to say that if a copy of this motion be received by the Commission on or by Thursday, [fol. 206] April 15, 1954, the five days' notice under Rule 30(1) will be waived. If the Commission waives such notice, then this motion may be submitted on Monday, April 19, 1954; but if the Commission does not waive such notice, the writer understands that the next motion day is on Monday, May 3, 1954, and the notice of this service will thereupon be for such date.

The writer is further authorized by Mr. DaPra to say that Mr. DaPra will likewise on Friday, April 16, 1954, advise the writer by Long distance phone whether the Commission will agree that this motion may be submitted on April 19, 1954, upon the motion and answer without the necessity of oral argument, or whether oral argument will be demanded by the Commission. As soon as the writer is advised by Mr. DaPra he will promptly call the Clerk of this Court by long distance phone.

7.

By virtue of all of the foregoing United requests that if the foregoing motion be granted by the Court that the time thereupon be enlarged within which United, as in

tervening Respondent, may prepare and file its brief. A brief properly setting forth the contentions of United for the consideration of the Court in decision of the petition to review would, as shown by the foregoing, be addressed [fol. 207] to the items in Exhibit "A", as well as those items already certified by the Commission, and thus United would desire some extension of time which the Court deems just from and after the date of the filing of the supplemental transcript within which to prepare and file brief. This extension is rendered necessary by telephonic advice to the writer by the Hon. William C. Chanler that his brief would be filed in this Court in this cause on either April 14 or 15, 1954.

WHEREFORE, premises considered, United prays the judgment of this Honorable Court of the foregoing motion for the preparation and certification of a supplemental transcript thereto, for an extension of time within which [fol. 208] to prepare and file brief of United in this matter, and for such other orders as to the Court may seem best and proper.

Thomas Fletcher, 11th Floor, Esperson Building, Houston 2, Texas. C. Huffman Lewis, 1525 Slattery Building, Shreveport, Louisiana, Counsel for Intervener United Gas Pipe Line Company.

Wilbert O. Crain, General Counsel; George D. Fiser, Vinson, Elkins, Weems & Searls, Niels Esperson Building, Houston, Texas, Wilkinson, Lewis & Wilkinson, Slattery Building, Shreveport, Louisiana; Of Counsel.

[fol. 209] Certificate of Service by Thomas Fletcher, dated April 14, 1954 (omitted in printing).

[fol. 210] EXHIBIT "A" TO MOTION

List of Items Sought to be Certified and Included in Supplemental Transcript of Record.

1. Federal Power Commission Order adopted July 10, 1953, issued July 10, 1953, in Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, titled "Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to become Effective on Thirty Days' Notice pending Hearing, Consolidating Proceedings and Fixing Date of Hearing".

2. Federal Power Commission Rate Schedule No. 20, Filed August 22, 1938, effective January 1, 1936, being contract between United Gas Public Service Company (predecessor of United Gas Pipe Line Company) and Mobile Gas Service Corporation, dated January 1, 1936.

3. Federal Power Commission Order dated —permitting F. P. C. Rate Schedule No. 20 to be filed and become effective.

(Refusal of access to Commission's files prevents any accurate description of the order.)

4. Supplement No. 7 to F. P. C. Rate Schedule No. 20 filed November 10, 1941, effective July 1, 1941, being a supplemental amendatory agreement dated October 17, 1941, between United Gas Pipe Line Company and Mobile Gas Service Corporation.

5. Federal Power Commission Order dated December 4, 1941, permitting supplement No. 7 to be filed and become effective.

6. Supplement No. 10 to Supplement No. 7 to F.P.C. Rate Schedule No. 20, filed August 14, 1946, effective July 26, 1946, being a letter amendatory agreement dated June 28, 1946, from Mobile Gas Service Corporation to United Gas Pipe Line Company consented to by the latter.

7. Federal Power Commission Order dated September 17, 1946, permitting Supplement No. 10 to Supplement No. 7 to be filed and become effective.

[fol. 211] 8. Supplement No. 9 to F. P. C. Rate Schedule No. 20, filed September 30, 1946, effective January 1, 1947, being a supplementary amendatory agreement dated July 30, 1946, between United Gas Pipe Line Company and Mobile Gas Service Corporation.

8-a. Federal Power Commission letter dated November 4, 1946, permitting Supplement No. 9 to be filed and become effective.

9. Supplement No. 11 to F. P. C. Rate Schedule No. 20, filed July 20, 1948, effective May 12, 1948, being a letter from United Gas Pipe Line Company to Federal Power Commission.

10. Federal Power Commission Order dated August 12, 1948, permitting Supplement No. 11 to be filed and become effective.

11. Order of October 12, 1948, wherein the Federal Power Company initiated on its own motion under Section 5(a) of the Natural Gas Act an investigation to determine whether any of United Gas Pipe Line Company's rates were unjust, unreasonable, unduly discriminatory, or preferential, docketed as G-1142.

12. From the filing of the conversion tariff, filed as required by the Rules and Regulations of the Commission:

Statement pursuant to Rule 154.85 applicable to F. P. C. Rate Schedule No. 20, listing those parts and portions of F. P. C. Rate Schedule No. 20 and the 46 supplements and amendatory agreement thereto to be retained as a service agreement as permitted by such Rules.

13. From original Volume No. 1 of the conversion tariff files as referred to in Item No. 12, Sheets 43 and 44, being Rate Schedule Ind. 3-J being the sheets in said conversion tariff applicable to Mobile Gas Service Corporation. [fols. 212-218] 14. Federal Power Commission Order allowing the conversion tariff to become effective in part (including that part applicable to Mobile Gas Service Corporation), suspending the conversion tariff in part, and suspending notice of cancellation and suspending certain application for increase in rate and not pertinent here, and dated July 31, 1952, issued August 1, 1952, in Docket G-2019.

15. On the filing for increased rates by United Gas Pipe Line Company at Docket G-2210:

(a) First Revised Sheet No. 40;
(b) Second Revised Sheet No. 31,
both filed June 24, 1953, and being applicable to the sale

to Mobile Gas Service Corporation for resale for industrial purposes (to Ideal Cement Company.)

16. Federal Power Commission letter notice to Mobile Gas Service Corporation dated June 26, 1953, advising and notifying of the filing in Docket G-2210.

17. Federal Power Commission Order in Docket G-2210 dated July 10, 1953, suspending certain proposed rate schedules, permitting certain proposed rate schedules to become effective on thirty days' notice pending hearing, ordering consolidation with Dockets G-1142, G-1508, G-2019, and G-2074.

18. Petition of Mobile Gas Service Corporation for leave to intervene in Docket G-2210, consolidated with Dockets G-1142, G-1508, G-2019, and G-2074, filed July 17, 1953.

19. Federal Power Commission Order adopted August 12, 1953, issued August 14, 1953, permitting and authorizing Mobile Gas Service Corporation to intervene and participate in the consolidated hearing in Dockets G-1142, G-1508, G-2019, G-2074 and G-2210.

20. In connection with the filing of the conversion tariff in Docket G-2019:

(a) Federal Power Commission Letter to Mobile Gas Service Corporation dated June 3, 1952, advising of the filing of the conversion tariff made on May 29, 1952.

(b) Federal Power Commission Letter Notice dated July 8, 1952, notifying of the re-filing of the conversion tariff on July 3, 1952.

[fol. 218a] [File endorsement omitted.]

[fol. 219] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITIONER'S MEMORANDUM IN OPPOSITION TO INTERVENOR'S MOTION FOR ADDITIONAL CERTIFICATION TO THE TRANSCRIPT OF RECORD AND ENLARGEMENT OF TIME TO FILE BRIEF—Filed April 19, 1954

This memorandum is submitted by petitioner, Mobile Gas Service Corporation (Mobile) in opposition to the motion of intervenor, United Gas Pipe Line Company (United), for certification of additional material in a supplemental transcript of record and, if such certification be ordered, for enlargement of intervenor's time to prepare and file its brief. It is petitioner's contention that the motion should be denied because all matters proper or necessary for a determination of the question under review are con- [fol. 220] tained in the transcript of record heretofore certified to this Court by the Federal Power Commission (the Commission), and because certain of the matters sought to be added raise issues which were not before the Commission in the proceeding in which the order under review was issued.

Statement

This is a proceeding to review an order of the respondent, Federal Power Commission, issued on December 7, 1953, which denied certain requests for final relief contained in a petition filed with the Commission by petitioner, Mobile Gas Service Corporation, on August 4, 1953, dismissed Mobile's petition, and terminated the proceeding. In its petition, Mobile had requested, together with certain other incidental relief, that the Commission reject the filing of a schedule of rates for the sale of gas by intervenor, United, on the ground that said schedule was illegally filed in violation of a valid and subsisting contract between Mobile and United.

The petition to review was filed on March 9, 1954. On April 7, 1954, the Commission certified to this Court the transcript on which the Commission's order had been entered. On April 14, 1954, Mobile filed its brief herein, to-

gether with an appendix containing the relevant portions of said transcript as filed with the Court by the Commission. [fol. 221] For the convenience of the Court, a copy of said appendix is submitted herewith. References herein are to the pages of said appendix.

On April 15, 1954, United filed the present motion, asking this Court to direct the Commission to certify certain additional material to be forwarded in a supplemental transcript of record, and, if its motion for the certification of additional material be granted, for an enlargement of its time to file an answering brief. It is petitioner's basic contention that the motion must be denied because all of the facts necessary for a determination of the issues decided in the order under review and presented for review herein are contained in the pleadings, which, together with certain incidental documents, have already been certified to the Court by the Commission. It is also our contention that an examination of the additional material sought to be added to the transcript will show that none of it is necessary for a determination of the issues presented and that, with one exception, none of it is legally admissible.

For convenient presentation, the additional material sought to be added to the transcript of record may be divided into three categories: (a) certain contracts which, while technically admissible because they were incorporated by reference in the petition which initiated the proceeding [fol. 222] under review, are nevertheless unnecessary because they were adequately described in the pleadings for the purposes of raising the issues determined by the Commission's order; * (b) certain documents which were not included in the record before the Commission, either directly or by reference and incorporation, and are, therefore, legally inadmissible, and are also unnecessary because all relevant portions of such documents were adequately described in the pleadings for the purposes of raising the issues determined by the Commission's order; (c) certain documents which were not before the Commission in the proceeding in which the order arose and which are not only legally inadmissible, but legally improper, because, according to

* These contracts have now been certified by the Commission, with our approval, so this point is moot.

United's motion papers. United now proposes to raise on this review on the basis of such documents certain issues of fact and law which were not raised before the Commission or passed upon by it in the order under review.

[fol. 223]

I

The Transcript of Record Certified to This Court by the Respondent Commission Contains All of the Documents Considered by the Commission in the Proceeding in Which the Order under Review Was Entered and Necessary for a Determination of the Issues Involved in This Review

The proceeding in which the order under review was issued was initiated on August 4, 1953, by the filing of a petition by Mobile (A. 19a) alleging, in substance, as follows: that it had entered into a valid and subsisting contract with United to purchase gas for resale to the Ideal Cement Company ("Ideal"), at the rate set forth therein, for a term of years; that in violation of said contract, United, on June 24, 1953, had filed a schedule of proposed rate increases with the Federal Power Commission under Section 4 of the Natural Gas Act; that such filing was illegal; and that by an order entered on July 10, 1953, the Commission had erroneously permitted such filed rates to go into effect. On the basis of these allegations, Mobile requested that the Commission reject the filing, or, in the alternative, hold a separate hearing as to the lawfulness of the filing, and grant Mobile certain other relief.

This petition was originally filed in consolidated proceedings then and now pending before the Federal Power Commission and relating to United's rates. But because Mobile was not at that time a party to these consolidated [fol. 224] proceedings, it requested leave to amend its petition so as to have it filed in a separate proceeding. This relief was granted by the Commission (A. 4a, 26a).

On September 14, 1953, United filed its petition to intervene and answer to Mobile's petition, in which, after reciting generally facts similar to those recited by Mobile, United set forth nine reasons why it claimed that it had a legal right to abrogate its contract with Mobile by merely filing a schedule of higher rates before the Commission under Section 4 of the Natural Gas Act (A. 32a, 36a-40).

On September 29, 1953, Mobile filed its reply to United's answer (A. 43a). On December 7, 1953, the Commission, without hearing, issued the order herein under review, denying all the relief sought by Mobile, asserting that the schedule of filed rates was properly filed under Section 4 of the Natural Gas Act, dismissing the petition and terminating the proceeding (A. 3a). It is apparent upon the face of the Commission's order that it was based on the allegations of Mobile's petition and that it determined only the legal arguments presented respectively by Mobile's petition and United's answer.

After denial by the Commission of Mobile's motion for rehearing on February 4, 1954 (A. 63a), the present petition for review was filed in this Court (A. 65a).

The Commission has certified as the transcript of record herein all of the documents docketed in the separate proceed-
[fol. 225] ing established by the Commission, as above stated, and in which the said order under review was issued.

The order under review recites the relevant facts appearing in the pleadings, and its decision is based exclusively on those facts (A. 3a). From a procedural aspect, therefore, the order under review was in the nature of a decision on a motion for judgment on the pleadings. It is axiomatic that on review of such an order, the appellate court can only consider the pleadings on which the order was entered.

The basic issue raised by those pleadings was purely a question of law: whether or not a valid and subsisting contract to furnish natural gas at a fixed rate for a term of years was valid and binding under the Natural Gas Act until set aside by the Commission on a finding that it was against the public interest under the provisions of Section 5(a) of the Act, or whether such a contract may be unilaterally abrogated by United by a mere filing of a schedule of higher rates under Section 4 of the Act. This was the only issue raised by the documents before the Commission or determined by the order under review, except for certain incidental procedural matters arising from the determination of the basic issue. As appears from the statement of "Questions Involved" in petitioner's brief filed herein on April 14, that is also the only issue presented on this review (except for the incidental procedural matters not here ma-

[fol. 226] terial). Those questions are there stated as follows:

> "1. Does the Natural Gas Act automatically render all contracts for the sale of natural gas at an agreed rate for a fixed term unenforceable and void, or does it delegate the power to abrogate such contracts to the Federal Power Commission?
>
> "2. If the Natural Gas Act does not automatically render all such contracts void and unenforceable, may the power to abrogate such contracts be exercised by a natural gas company by the mere filing of a schedule of increased rates under Section 4, or can it be exercised only by the Commission after a hearing and finding under Section 5(a) that the contract is unreasonable?
>
> "3. Do the provisions of Section 4(e) prevent the Federal Power Commission from making provisions for refund in the event a proposed schedule of higher rates which has not been suspended is ultimately held unreasonable or unlawful?" (Petitioner's Brief, p. 1)

We submit that it is clear from an examination of the petition, answer, reply, and from the Commission's order itself (A. 3f) that all of the facts necessary for a determination of these questions are contained in the documents upon which the Commission acted and which have been certified by the Commission to this Court.* We submit that they are the only documents which may be considered by this Court on this review.

[fol. 227]

II

None of the Documents Sought to be Added to the Transcript of Record Are Necessary to a Determination of the Issues Presented, and Most of Them are Legally Inadmissible.

While intervenor's motion papers divides the documents which it seeks to have added to the transcript of record

* Mobile's petition is at page 19a of the Appendix, United's answer at page 32a; Mobile's reply at page 43a and the Commission's order at page 3a.

into four separately numbered point headings, we propose to consider them here in the three separate categories hereinabove outlined: (a) those technically admissible but unnecessary; (b) those not before the Commission, and unnecessary to a determination of the question presented; and (c) those which were not before the Commission and which raise issues not presented or passed upon by the Commission in the order under review.

(A) *Documents technically admissible but unnecessary.*

The pertinent provisions of the four contracts referred to under subheading "2" of the motion papers herein, and listed as items 2, 4, 6 and 8 in Exhibit A thereto, being the contracts between Mobile and United which Mobile now contends were improperly abrogated by the filing of the schedule of proposed higher rates, are adequately described in the pleadings and are likewise adequately described in the Commission's order, for the purpose of raising the issues here involved. There appears to be no necessity, therefore, to print them in full as a [fol. 228] part of the record. However, as these contracts were expressly incorporated by reference in Mobile's original petition initiating the proceedings before the Commission, they would appear to be technically a proper part of the record and Mobile has no objection to their certification if the Court so desires.*

(B) *Documents which are both inadmissible and unnecessary.*

These documents are referred to under various headings in the motion papers and therefore we will deal with them separately in an attempt to meet the points made as to each group.

(1) In Point 1 of the motion papers, United asks that the Commission's order of July 10, 1950, be certified on the ground that this was the order which permitted the

* We have now been informed that the Commission intends to certify these contracts, and have no objection thereto.

proposed rate increases complained of by Mobile to become effective as of July 25, 1953. This order was not made a part of the record in the present proceedings by either party. The relevant portions thereof were either quoted or described in the petition (A. 15a-16, 18a-21). We submit that it is apparent from the Commission's order that [fol. 229] such quotations and description are sufficient to support a decision on the questions at issue. We think, therefore, that it would be improper to permit the order to be added to the record, lest other issues not raised before the Commission and not heretofore advanced by any party might be predicated thereon for the first time in the proceedings before this Court.

(2) In Point 2 of the motion papers, in addition to the four contracts hereinbefore referred to, United asks that the orders of the Commission permitting the contracts to become effective should be added to the record (Ex. A, items 3, 5, 7 and 8-a). These orders were not made a part of the record before the Commission. However, Mobile's petition recites that the contracts had been duly filed with the Commission (A. 13a-14) and United's answer recites that they were "by this Commission permitted to become effective" (A. 33a). These recitals of the effect of the orders were accepted by the Commission (A. 5a), and we believe that it would not only be unnecessary but improper to permit such orders to be added to the record at this time, lest additional issues not presented to the Commission should be based thereon. If United intended to base any additional arguments on any particular provisions of these orders not presented by the pleadings, it had an opportunity to raise them before the [fol. 230] Commission in its answer to Mobile's petition. It cannot raise any such issues as an afterthought on this review.*

* We should like to point out in passing that in any event the so-called reservations in the Commission's orders as to the effect of the acceptance of these contracts for filing, relied on so heavily by United (p. 4 of its motion papers) constitute no more than a restatement of the legal rights of the Commission to modify or abrogate contracts under Section 5(a), which we have at all times conceded.

(3) Under subheading 4 of the motion papers, at pages 8 through 12, United argues that certain documents relating to Mobile's petition to intervene in the consolidated proceedings now pending before the Commission, in which United's general rate structure is under review, should be included in the certified record. The items are listed as numbers 15 through 19 in Exhibit "A" of the moving papers.

The fact that United filed a petition to intervene in these proceedings and that its petition was granted is fully set forth in the pleadings and was recognized by the Commission in the order under review. Moreover, in that order the Commission made the very point now raised by United: That even though the filing of rates over and above the contract rates was legal and proper, Mobile still had a right to urge in the consolidated proceedings that the proposed increased rates were unreasonable, and to argue that the contract rates were reasonable (A. 6a-7); but, as United itself points out at page 10 of its motion papers, it could only make this argument "because they [the contract rates] were just and reasonable, and not because they were contained within a contract."

[fol. 231] This issue, of course, begs the very question raised in the present proceeding. There has never been any question that Mobile could attack the reasonableness of the increased rates in the consolidated proceedings, regardless of whether or not it had a contract. That is the right of any purchaser when the natural gas company files a schedule of increased rates under Section 4 of the Act. The point which Mobile is raising in the present proceeding is that, precisely because it has a contract, it is in a different and better position than that of ordinary rate payers who have no contracts. It is Mobile's contention that it may rely upon its contract and that its rates may be not be increased *until and unless* the commission after a hearing shall find that the contract itself is so unreasonable or harmful that the public interest requires that it be abrogated or modified.

The difference between Mobile's position and that asserted by the Commission and United on this point is the crux of the entire controversy. The question is whether

Commission in this proceeding, but as to which no supporting allegations of fact are contained in the pleadings.*

We submit that it follows that United cannot now attempt to raise in this proceeding an issue which, even if it has any merit, it could properly have raised in the proceeding in which the order under review was entered, but which it expressly failed to raise at that time.

[fol. 238] Conclusion

The question at issue in this proceeding to review is a simple question of statutory construction: Does the Natural Gas Act automatically render all private rate contracts void *ab initio*, or does it merely render them voidable after a finding that the public interest requires that they be modified or abrogated?

If rate contracts are void *ab initio*, then concededly Mobile has the burden of attacking the reasonableness of the proposed new rates in the consolidated proceedings and of establishing the reasonableness of the contract rates. If the contract is only voidable, Mobile's only burden is to defend the reasonableness of its contract if it is attached in the consolidated proceedings—and in the meantime it need not pay more than the contract rate.

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* We should like to point out that in any event United's repeated assertions in its motion papers "that the filing of a conversion tariff required by the Rules and Regulations of the Commission which rendered abandonment of a contract as such compulsory" (motion, p. 7) is squarely contradicted by the Commission's own interpretation of its rules requiring conversion:

> "As stated in Order No. 144, Section 154.85 of the newly amended regulations expresses 'the Commission's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." F. P. C. Order 12/21/48 (CCH Utilities Law Reporter, Federal Transfer Binder, p. 9477).

If rate contracts are void *ab initio*, the question whether or not Mobile's contract was abrogated by the conversion order in 1952 is moot. If Mobile's contract is only voidable, United has ample opportunity to raise its newly asserted contention that the contract was abrogated by the conversion order, when attacking the reasonableness of the contract in the consolidated proceedings.

Thus, even if they were otherwise legally admissible, the issues sought to be raised by United on the basis of the [fol. 239] documents it seeks to add to the record are issues which cannot arise until the question raised by the present petition to review has been resolved. After this Court has authoritatively decided whether or not Mobile's contract is void or voidable, these issues can be presented to and passed upon by the Commission. But until they have been so passed upon, they cannot be "reviewed" by this Court.

The facts raised by the pleadings before the Commission are amply sufficient to raise the legal question of statutory construction here involved. No additions to the record are either necessary or proper on this review of the Commission's order.

The motion should be denied in all respects, except as to the contracts incorporated by reference in Mobile's original petition, which are listed as items 2, 4, 6 and 8 in Exhibit A to the moving papers.

Respectfully submitted, Winthrop, Stimson, Putnam & Roberts. Winthrop, Stimson, Putnam & Roberts; Johnston, McCall & Johnston, Attorneys for Petitioner, Mobile Gas Service Corporation.

April 19, 1954.

Mobile's contract is valid until it is set aside upon a finding of unreasonableness, or whether its contract is valueless because it may be abrogated at any time, unilaterally, so that Mobile is in no better position than any other rate payer. In the latter case it can only appear in the con-[fol. 232] solidated proceedings, where it has the burden of establishing the reasonableness of the contract rates. If a contract is valid, however, it is United which must proceed in the consolidated proceedings under Section 5(a) of the Natural Gas Act, and bear the burden of establishing to the satisfaction of the Commission that the contract is so unreasonable that it must be set aside. In such a proceeding, of course, United has the burden of proof, and Mobile is quite prepared to meet the issue on that basis.

As a practical matter, the difference between these two positions is of vital importance. The consolidated proceedings were commenced in 1948, and at the present date United has not yet completed its affirmative case in defense of its proposed rate increases. As a result of the procedure adopted by United and approved by the Commission in the order under review, Mobile since July 25, 1953 has been paying 14.5¢ per MCF for gas which under its contract with Ideal it is obligated to resell for 12¢ per MCF, and, if the Commission's order is not reversed, Mobile will have to continue to do so until the eventual termination of the consolidated proceedings—or until it is bankrupt. Moreover, under the Commission's order here under review, Mobile is denied even the minimal right of an order of refund even if it should ultimately succeed in establishing the reasonableness of its contract rates.

[fol. 233] Finally, the burden placed upon Mobile of establishing the reasonableness of the contract rates in the consolidated proceedings "because they [are] just and reasonable and not because they [are] contained within a contract," as contended by United at page 10 of its motion papers, is by hypothesis an insurmountable burden. For it was contemplated at the time the contract was entered into that the rates would be lower than the "reasonable rates" to which United would be normally

entitled, for the purpose of obtaining the business of the Ideal Cement Company. It is obvious, therefore, that Mobile's contract rights can not be protected in the consolidated proceedings.

It follows that nothing can be added to the issues in the present proceeding by including upon the record herein matters relating to the consolidated proceedings. There is no controversy either as to what is involved in those proceedings or as to Mobile's right to appear therein. The question at issue is whether Mobile has a totally different right, which is not available to it in those proceedings, to insist that its contract be enforced until and unless set aside as provided under Section 5(a) of the Act. Thus, there is no possible justification for the inclusion of these documents in the pending proceeding.

[fol. 234] (C) *Documents which were not before the Commission and which raise issues neither presented nor passed upon in the order under review.*

In its subheading 3, at pages 5 to 8, United asks that certain documents relating to the filing of what it describes as a "conversion tariff" in the year 1952, including certain provisions of that tariff and an order of the Commission approving the same (Exh. A, items 12, 13, 14), be included in the transcript of record because United now contends, for the first time so far as we are aware, that the effect of that conversion tariff and order was to abrogate or modify the very contract the legal effect of which constituted the sole issue in the present proceeding. An examination of the pleadings and of the Commission's order herein will disclose that in its petition Mobile referred to the conversion tariff as follows (A. 14a-15):

> "On or about May 29, 1952, United filed with the Federal Power Commission a restatement of its FPC Gas Tariff, as Original Volume No. 1. Among other things, said tariff included Rate Schedule Ind-3J. This schedule, which was comprised of Original Sheets No. 43 and No. 44 of said Original Volume No. 1, was for sales to Mobile for resale to Ideal, and specified that the rate for such sales was 10.7 cents per MCF for all natural gas sold by United to Mobile

for resale to Ideal. *Mobile was advised by United that the filing of this rate schedule carried out only a restatement of United's existing contract rate.* As a practical matter, the rate specified in the new tariff was virtually identical with that which United had contracted to charge Mobile for gas sold to Mobile for resale to Ideal." (Italics supplied)

[fol. 235] United's answer referred to this so-called conversion tariff at page 34a in the following language:

> "In accordance with the provisions and requirements of the Rules and Regulations of this Commission, United filed on or about the 3rd day of July, 1952, its FPC Gas Tariff converting all contracts and contractual agreements for service and rates into tariffs as provided by the Rules and Regulations of the Commission, one of such contracts so converted into tariff form was the contract and all supplements and amendments thereto described in Paragraph II hereof. Said conversion tariff, together with the service agreement supporting the same, superseded all of the terms and provisions of said original contract and supplements thereto except those provisions expressly retained as permitted by the Rules and Regulations of this Commission and thereby became the only lawful basis for service and the rates and charges to be made therefor lawfully chargeable by United to Mobile for the service and sales covered by said tariff."

Thus it will be observed that while United alleges that the said conversion tariff modified the original contract in some respects, it does not specify in what respects it was so modified, and therefore does not controvert Mobile's allegation that the said conversion tariff modified the said existing agreement only to the extent of converting the rates provided for therein from a percentage to a dollars and cents basis.

Moreover, after reciting these and other facts, United's answer proceeded to list nine separate reasons in support

of its contention that, as a matter of law, the existing contract between Mobile and United did not prevent United from presently increasing the contract rate by merely [fol. 236] filing a schedule of higher rates under Section 4 of the Natural Gas Act (A. 36a-40). Not one of these arguments bears any relation to the contention United now seeks to raise, to the effect that filing of the so-called conversion tariff in 1952 in some way modified the portions of the contract out of which the issue passed on by the Commission arose: United's agreement to sell gas to Mobile for resale to Ideal at a fixed rate for a term of years. On the contrary, all of United's arguments are directed solely to refute Mobile's contention that, as a matter of law, under United's construction of the Natural Gas Act, such a contract, even though valid and subsisting as a contract, could be abrogated by the filing of a higher rate under Section 4.

Finally, that no such issue was ever raised before or passed upon by the Commission is apparent from the Commission's order in which the only reference to the conversion tariff is as follows (A. 5a):

> "* * * On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 1, in which, without altering the contract provisions, United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf."

Thus, we submit that it is quite apparent that the order under review was based on the uncontroverted allegation in the petition that the contract was unaltered by the 1952 order, except to the extent that the rate was converted from a percentage to a dollars and cents basis.

[fol. 237] United's present contention that this conversion tariff in some way altered the basic rights of the parties in so far as they were at issue before the Commission in this proceeding—that is to say, in so far as their validity in the light of Sections 4 and 5 of the Natural Gas Act are concerned—is thus an entirely new and different contention, an afterthought which not only was never presented to the

[fol. 240]. [File endorsement omitted.]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

RESPONDENT'S ANSWER AND OBJECTIONS TO INTERVENOR'S MOTION FOR AN ORDER DIRECTING RESPONDENT TO CERTIFY ADDITIONAL DOCUMENTS—Received & Filed, April 19, 1954.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, Federal Power Commission objects, in part, to the motion filed by Intervener, United Gas Pipe Line Company, requesting that this Court direct Respondent to certify additional documents other than those documents certified by Respondent to this Court on April 9, 1954.

As shown more fully in the attached Memorandum in Support, Respondent certified to this Court a transcript of the documents filed in the proceeding at Docket No. G-2227. Such certified transcript contained all of the documents upon which the order complained of was entered, as required by Section 19(b) of the Natural Gas Act. It was filed within the time prescribed by Rule 18(6) of this Court. [fol. 241] A scrutiny of the pleadings in the proceeding indicates that the documents listed in Items 2, 4, 6, and 8 of Appendix "A" to Intervener's motion had been incorporated by reference in the petition of Mobile Gas Service Corporation in the proceeding at Docket No. G-2227, and appear properly to be a part of the transcript of the documents in this proceeding. A supplemental transcript containing such documents has been forwarded to this Court.

WHEREFORE, Respondent respectfully moves this Court for an order denying Intervener's motion, except to the extent heretofore noted.

Respectfully submitted, /s/ Willard W. Gatchell, General Counsel, Lambert McAllister, Assistant General Counsel, Louis L. Da Pra, Attorney, Sherman S. Poland, Attorney, Counsel for Respondent, Federal Power Commission, Washington 25, D. C.

[fols. 242-247] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING MOTION FOR CERTIFICATION OF ADDITIONAL MATERIAL—filed April 19, 1954

Upon consideration of the motion by United Gas Pipe Line Company, intervenor, for certification by respondent of additional material as a supplemental transcript of record; and of the memoranda filed in support of and in opposition to the motion; and after hearing;

It is ORDERED that the motion be, and it is hereby denied.

By the Court, Goodrich, Circuit Judge.

April 19, 1954.

[fol. 248] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

UNITED GAS PIPE LINE COMPANY, Intervener

On Petition to Review an Order of the Federal Power Commission

Argued May 19, 1954

Before McLAUGHLIN, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT—Filed September 7, 1954

By McLAUGHLIN, Circuit Judge.

In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas

Act[1] a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the Commission considers to have happened to petitioner's contract with intervener.

[fol. 249] Mobile Gas Service Corporation, the petitioner, is an Alabama distributor of natural gas. It receives its entire supply of that fuel from the intervener, United Gas Pipe Line Company, a Delaware corporation.[2] By a 1936 contract between it and United's predecessor and an agreement entered into in 1941 with United itself certain of Mobile's gas for resale industrially was to be supplied by United for 90% of Mobile's gross resale revenues. The contract provided that the gas was not to be resold industrially for less than 16¢ per MCF (1,000 cubic feet) without United's consent. This agreement as amended by the 1941 contract was to continue in effect until 1962. Both contracts were filed with the Commission and became United's Gas Rate Schedule #20 and Supplement to that Schedule #7.

In 1946 United agreed with Mobile to a proposed arrangement between Mobile and Ideal Cement Company whereby the latter could be supplied with its industrial gas needs by Mobile for 12¢ per MCF for a period of ten years provided total deliveries remained between 100,001 and 400,000 MCF per month. In accordance with this United consented to accept the percentage rate of Mobile's sales to Ideal though this would be less than the minimum of 16¢ per MCF. United also agreed at that time to reduce the price of industrial gas to Mobile from 90% of the latter's gross resale revenues to 80% up to 41,667 MCF per billing month and 90% in excess thereof. Those agreements were filed with the Commission as Supplements #9 and #10 to United's Rate Schedule #20. Mobile then consummated its proposed contract with Ideal Cement Company to supply gas to the latter for ten years at 12¢ per MCF. The Alabama Public Service Commission approved that contract. Not only United but the Commission recognized the

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[1] 52 Stat. 821-833; 15 U.S.C. Section 717-717w (1952).

[2] Jurisdiction is obtained by reason of Section 19(b) of the Natural Gas Act. 52 Stat. 831; 15 U.S.C. Section 717r (b) (1952).

contract as late as July, 1952 when the Commission allowed United to substitute in its filed tariff a flat rate of 10.7¢ per MCF in place of the percentage rate Mobile had been [fol. 250] paying. As United advised Mobile, this substitution was made under the Commission directive to convert from percentage to fixed sum and was almost identical with the amount the Mobile percentage rate actually figured.[3]

On June 24, 1953, United filed with the Commission proposed increased rates, including a rate of 14.5¢ per MCF for industrial use gas for Mobile. On July 10, 1953, the

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[3] In Tyler Gas Service Co. v. United Gas Pipe Line Co., D. C. Tex., Dec. 23, 1953, unreported, (on appeal, 5th Cir.), United had agreed to just such an arrangement as Mobile made with Ideal—that is the furnishing of natural gas at a reduced rate. There the period was sixteen years.

In that suit there was a denial of an application for an injunction to prevent United from moving before the Commission for permission to collect its new rate for domestic use gas until the reasonableness of that rate had been finally determined by the Commission. There was a contract involved but it had already been modified in what seems to have been an adversary proceeding. According to the opinion of the district judge the "* * * plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates. * * *." The all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to the acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate was not before the court.

It should be emphasized also that the fact that Tyler concerned a rate for sale of gas for domestic use of itself sets that action apart from the issue of this appeal. In Tyler under Section 4(e) the Commission could and did suspend the effective dates of the increased rates for five months after which period it could order any subsequent collections to be held subject to refund in the event the new rates were ultimately found to be unlawful.

Commission ordered a hearing on the lawfulness of those rates, suspended them pending the hearing with the exception of the new Mobile rate, and ordered that hearing to be consolidated with an earlier proceeding investigating all of United's rates. The new rate for Mobile being for industrial use was not subject to suspension under Section 4(e) of the Act. As a result it became operative July 25, 1953. Mobile, on July 16, 1953, attempted to intervene in the consolidated proceeding. On August 4, 1953, it filed a petition with the Commission setting up the above situation and asking the Commission to amend its order of July 10 so that United's new filing in so far as it affected the Ideal contract would be rejected and the 14.5¢ rate would not be permitted to take effect. In the alternative it requested a hearing on the lawfulness of the filing of that rate and [fol. 251] asked that if Mobile was obligated to pay United the increased rate, United be directed to hold those payments subject to refund to Mobile in the event the new rate was ultimately determined to be unlawful. At that stage no action had been taken on Mobile's application to intervene and the new rate had been governing since July 25th. As a consequence Mobile amended its petition and urged the Commission that it be made a separate cause. That prayer was granted as was United's later petition to intervene in the new proceeding. On December 7, 1953 the Commission on the pleadings denied the prayers of Mobile's petition and dismissed it. On February 4, 1954, the Commission refused rehearing to Mobile. This petition for review of the Commission's decision followed.

Mobile's main point is that its United contract with respect to Ideal is a valid agreement which cannot be set aside by United's unilateral action of filing an increased rate schedule. It frankly recognizes the Commission's paramount authority and concedes that if after a proper proceeding the Commission found the contract rate to be against the public interest it could modify it or set it aside entirely.

The Commission contends that where a natural gas company files a rate schedule under 4(d) of the Act that rate is to be charged unless suspended initially or disapproved finally by the Commission after investigation and hearing; rates for industrial use not being subject to sus-

pension when filed become effective thirty days thereafter until finally passed upon by the Commission. The latter insists that even where as here the rate conflicts with an admittedly preexisting filed contract the distributor is given no chance to defend its contract, on which it has made approved commitments, before that contract is to all practical purposes abrogated.

It is undisputed that under the ordinary 4(e) proceeding which the Commission has instituted with reference to the new rate schedule involved the dispositive question be- [fol. 252] fore the Commission is whether the increased rates are just and reasonable. 4(e) makes this plain when it says:

> "* * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

In other words if in the pending hearing United can show that its new filed rate for Mobile is reasonable that ends the matter and the new rate stands. No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts. What petitioner is endeavoring to do is have its contract passed upon in the first instance prior to authorization for filing of United's new rate and the consideration of whether that rate is currently reasonable.

The Commission maintains that 4(d) of the Act[4] up-

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[4] Section 4(d) of the Act reads as follows:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commis-

holds its stand. That section provides, as far as we are primarily concerned, that "no change shall be made by any natural-gas company in any such rate * * * or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis supplied). This [fol. 253] means, according to the Commission, that since under 4(e) it does not have the power to suspend an industrial use gas rate, United can fundamentally cancel the Mobile contract despite the fact that as of now Mobile is bound for its duration to Ideal, subject only to the Commission later passing finally upon the rate. And in the Commission thought this can take place without any statutory notice to Mobile or an opportunity for Mobile to be heard regarding its contract rate. The practical result of this is that Mobile in living up to its contract with Ideal is supplying natural gas to that company for 12¢ per MCF and may well be forced to continue to do so until the expiration of its contract in 1956. Meanwhile Mobile must pay United 14.5¢ per MCF for the same gas it delivers to Ideal though its contract with United has never been questioned by the Federal Power Commission or in any way construed to be against the public interest.

The Commission and intervener rely to a large extent upon Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372 (1919), and Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109 (1937). The first case is quoted by the Commission as holding at page 375: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." The principle stated is of course sound law and is expressly un-

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sion and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

controverted by petitioner. In the Union litigation there had been a hearing before the Georgia Commission on the question of the reasonableness of the contract rates. The Commission found that they were unlawfully discriminatory. Here, as we have seen, Mobile had no opportunity to defend the contract rate prior to the new rate coming into being.

Midland does lend some support to the position of the Commission and the intervener. But there the rates filed by the utility were not opposed and were permitted by the [fol. 254] Missouri Utility Commission without hearing.[5] Far more important than that the decision is based upon a state court interpretation of a state statute. The question litigated and passed upon was whether a Missouri statute as construed by the Missouri Supreme Court violated the federal constitution. That sort of problem is not presented in this action.

Another case involving a state court explanation of a state law is Wichita R. R. v. Public Utility Commission, 260 U. S. 48 (1922).[6] That came into the federal courts through diversity of citizenship and as far as it goes affords strong help to petitioner. In it the Kansas Commission without any finding of unreasonableness and despite a duly filed contract for the sale of electric power, authorized a surcharge. The railroad had appeared in the Commission proceeding and had objected. The matter was removed to the

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[5] A very real distinction exists between the position of the realty company in Midland and that of the present petitioner. Hearings were held on similar contracts and the latter found unreasonable prior to the utility company's suit against Midland being disposed of and Midland had not appeared in those hearings. In other words Midland made no attempt to attack the new rate directly before the Commission but contented itself with raising a defense in a collateral proceeding brought by the utility company.

[6] See also Attleboro Steam & Electric v. Narragansett Electric Lighting Co., 295 Fed. 895 (R. I., 1924) construing a similar Rhode Island statute.

United States District Court which restrained execution of the Commission's order.[7] The Eighth Circuit reversed.[8] The Supreme Court upheld the district court, quoting with approval from the opinion of the Kansas Supreme Court in Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 (1915) where it is stated that:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the con- [fol. 255] tract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute[9] a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act, (Section 5(a)) that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. Section 5(a) reads:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or

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[7] Wichita's motion for judgment on the pleadings was granted. There was no reported opinion.

[8] 268 Fed. 37 (8th Cir. 1920).

[9] Public Utility Law of Kansas, Session Laws of 1911, c. 238.

classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a [fol. 256] decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 5(a) was before the Tenth Circuit in Colorado Interstate Gas Co. v. Federal Power Commission, 142 F.2d 943, 954 (1944), affd. 324 U.S. 581 (1945). In that case on complaint of the City and County of Denver and the State of Wyoming the Commission held that existing rates and contracts were unreasonable. The gas companies claimed that the finding was not founded on substantial evidence. The Court said:

"* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431."

The Commission suggests that the Colorado decision is not applicable because the proceedings were under Section 5 but we fail to note any contradiction of the court's statement that filed contract rates and charges can only be set aside on an express finding of unreasonableness which [tol. 257] in turn specifically follows the very opinion (Wichita) that the Commission asserts turns on a peculiar Kansas law. Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of "scheme of regulation" it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. In F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239, the Supreme Court made it abundantly clear that such authority "requires clear authorization", which is absent from the Natural Gas Act. In the Niagara Mohawk litigation the query was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. The Supreme Court interpreting that statute said at p. 251:

> "* * * We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. * * * On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties."

So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.

Beyond question the Commission's action in this instance would result in further impairment of petitioner's common law rights. As the Supreme Court stated in Texas

[fol. 258] and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907), a case cited by intervener but interpreting the Interstate Commerce Act:

> "* * * a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See Shaw v. Railroad Co., 101 U.S. 557, 565 (1879); American District Telegraph Co. v. Kittleson, 179 F. 2d 946, 953 (8th Cir. 1950); 3 Sutherland, Statutes and Statutory Construction (3rd ed. 1943) 164-182.

Nor is a rate contract automatically nullified merely because the return is low. In this instance there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long-range price concession was made in order to obtain it. Cf. Arkansas Natural Gas Co. v. Railroad Commission, 261 U.S. 379 (1923); Railroad & Light Co. v. Court of Industrial Relations, 13 Kan. 217, 214 Pac. 797 (1923). And the fact that the Commission can change the contract does not render it void for lack of mutuality. Southern Utilities v. Palatka, 268 U.S. 232 (1925); Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 64 F. 2d 881 (10 Cir. 1933).

With reference to the pertinent legislative history regarding such contract as before us, all three of the parties quote the colloquy between Congressman Halleck and Mr. Booth, appearing for the Illinois Public Service Commission on the bill which immediately preceded the Natural Gas Act. The accurate report of this reads:

> "Mr. Halleck: Of course, it is your idea that if this bill should pass and the Commission be given the [fol. 259] authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?
>
> "Mr. Booth: That certainly would be my position and we certainly would ask the Federal Power Com-

mission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return upon the fair value of its property." (Emphasis supplied).

Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H.R. 4008, at page 43.

The reasonable inference from the above is identical with petitioner's theory, namely, that the Commission has the power to eliminate a private contract; not that the latter is automatically destroyed by the unilateral action of a party thereto.[10]

There is no mention in the debates of Congress that the Act was ever intended to permit a contracting party to eliminate its existing contracts simply by giving thirty days' notice to the public and to the Commission. Instead the Act was stated to contain the "usual provisions * * * such as we find in all regulatory measures enacted by Con-

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[10] The intervener cites Armour Packing Co. v. United States, 209 U.S. 56 (1908), for the point that Congress intended the scheme of the Act to replace every other device, including contract provisions. That case was under the Elkins Act amendment to the Interstate Commerce Act. As the opinion itself states that amendment was adopted to make certain that all shippers be given the same treatment with one rate for a similar carriage of freight. The court also made clear that the Interstate Commerce Act contained no provision for the filing of contracts with shippers. The lack of recognition of that type of agreement in the Interstate Commerce Act was for the consideration of Congress stated the Court. Commenting on the omission of the Interstate Commerce Act to provide for private contracts the Court said at page 82: "It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done." As we have seen this possible course outlined by the Supreme Court in Armour has been followed in the later Natural Gas Act.

[fol. 260] gress",[11] and according to the Committee report, there was "nothing novel in its provisions."[12] It should also be noted that there was virtually no opposition to the bill from any source.[13]

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[11] 81 Cong. Rec. 6722 (1937):

"Mr. Lea: * * *

"There are the usual provisions. Without attempting to go into detail, what I call usual provisions are those such as we find in all regulatory measures enacted by the Congress. This bill contains, for instance, administrative provisions; for rules affecting just and reasonable rates; for the power of the Commission to fix maximum or minimum rates or a specific rate after hearing; for the rule against discriminations and preferences as between consumers or localities; for the requirement that the schedules be kept open for public inspection; for the power of the Commission to suspend the rates where deemed unduly high. The bill covers the question of accounting, following standard lines; of giving the Commission the power to control the accounts, including the depreciation account; and of requiring the gas companies under the regulation of this bill to conform to those accounting practices.

* * * * * * *

"The bill makes provision for complaints and provides for hearings and has the usual provisions in reference to the production of testimony and rehearings by the Commission on petition, court review of the orders of the Commission, and, a rule, that the findings of the Commission, if supported by substantial testimony, are conclusive upon courts in connection with questions that may be taken to courts.

"Those are what might be called the principal provisions of the bill."

[12] H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. See Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 601 (1945).

[13] 81 Cong. Rec. 6725 (1937):

"Mr. Mapes: Mr. Chairman, as far as I know, there is no opposition to this bill. I do not know of any member of the House or anyone else who opposes it. It is

The Commission itself in its brief says:

> "The reports of the Federal Trade Commission on the natural-gas industry abound with references and data concerning the contracts of gas companies most of them for long terms. It was at the time of the passage of the Act, and is now, a common and usual practice for such gas companies to contract for all sales or transportation of natural gas. Those companies which sold otherwise were exceptions."

[fol. 261] This being so one would think that there would be at least some debate on a provision which provided for the lawful unilateral cancellation of that type of agreement if Congress had that in mind.[14]

The Commission also makes much of the provision in Section 4(e) which prohibits the Commission from suspending rates for the sale of natural gas for resale for industrial use. The purpose of this provision, however, as stated by the Congressman who introduced the amendment, was "to prevent suspension in cases of industrial use *where there are short term contracts* * * *."[15] (Emphasis supplied). The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. The implication is equally

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supported by the public utility commissions of the States and by all public bodies, as far as I know, who have anything to do with or have given any particular attention to the question of the distribution and sale of natural gas to the consuming public. As a matter of fact, my attention has not been called to any opposition to it, even on the part of the gas companies themselves."

[14] The Commission points to certain evidence of the Commission's solicitor on a predecessor bill as demonstrating the intent to make filing procedure controlling irrespective of the contractual situation. There is nothing in that testimony from which it can be fairly concluded that the kind of contract before us was within the contemplation of the witness or his examiners.

[15] 81 Cong. Rec. 6727 (1937).

clear that Congress did not visualize the present circumstances where one of the contracting parties is attempting under the cover of the Act to avoid its contractual duties.

The Commission's order under review refers to Part 154 of the Commission's Regulations under the Act. Those Regulations give no assistance to the Commission's interpretation of Section 4. The very section of the Regulations under which United filed its conversion schedules [16] in May, 1952 reads as follows:

> "Section 154.85. *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable [fol. 262] provisions of the rate schedules and general terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided, further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.*" (Emphasis supplied in part).

United's filing on June 24, 1953 did attempt "to effect a change" in an unexpired contract without "the execution of a form of service agreement contained in the tariff."

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[16] There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate. The latter as has been mentioned was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract.

This case is therefore distinguishable from Mississippi River Fuel Corp. v. Federal Power Com'n, 202 F. 2d 899 (3rd Cir. 1953), where we held that all the filing requirements had been complied with and where there was apparently no existing filed contract. Moreover, we assumed for the purposes of that case "that the Commission has the power, implied from its authority to make rules and regulations, to reject a proposed filing which does not conform to such rules and regulations." *Mississippi River Fuel Corp. v. Federal Power Com'n, supra* at 901. See 18 CFR Section 154.24.[17]

In view of the above language in the Commission's own Regulations and of the complete absence of suggestion in the statute or in the legislative history that the Act was intended to authorize the abrogation of existing con- [fol. 263] tract rights by means of the unilateral substituted gate procedure, we hold that the Commission erred in not rejecting United's Revised Sheets Nos. 39 and 40 in so far as they affected the Ideal contract. To do otherwise would be an attempt by us to legislate judicially since the construction of 4(d) as contended for by the Commission and the intervener is not warranted by the statutory language. *F. P. C. v. Niagara Mohawk Power Corp., supra.* Any changes in 4(d), particularly of the radical nature urged, would be for the consideration of the Congress, not for this court.

With this holding it becomes unnecessary for us to consider Mobile's alternative contention that even if the revised schedule be accepted for filing a subsequent separate hearing be held on the lawfulness of the filing at which time the reasonableness of the prior contract rate would be passed upon. Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies collected after the acceptance of such filing be held subject to refund. Since we are specifically holding that the pertinent part of the order of July 10, 1953

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[17] "Section 154.24. *Rejection of material submitted for filing.* The Commission reserves the right to reject any material submitted for filing which fails to comply with the requirements set forth in this part [Section 154]."

was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile. *B. & O. R. Co. v. United States*, 279 U.S. 781 (1929); Restatement, Restitution, Section 74 (1937); cf. *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U.S. 134 (1919).

Those parts of the Commission's order which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, will be reversed.

[fol. 264] HASTIE, Circuit Judge, dissenting

The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent.

[fols. 265-282] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent

Present: McLaughlin, Staley and Hastie, Circuit Judges.

JUDGMENT — Filed September 7, 1954

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and

adjudged by this court that those parts of the order of the Federal Power Commission which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, be, and the same are hereby reversed.

Attest: Ida O. Creskoff, Clerk.

September 7, 1954

[fol. 283] [File endorsement omitted]

In United States Court of Appeals

Mobile Gas Service Corporation, Petitioner

vs.

Federal Power Commission, Respondent

United Gas Pipe Line Company, Intervener

Order Staying Issuance of Mandate—Filed October 2, 1954

The issuance of the mandate in this case will be stayed to and including November 8, 1954.

By the court, McLaughlin, Circuit Judge.

October 2, 1954

[fol. 284] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 285-286] SUPREME COURT OF THE UNITED STATES

FEDERAL POWER COMMISSION, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION, UNITED GAS PIPELINE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 29, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1955.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 29th day of November, 1954.

[File endorsement omitted.]

[fols. 287-288] SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION

ORDER ALLOWING CERTIORARI—Filed February 28, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

{fols. 289-290} SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1954

No. 556

FEDERAL POWER COMMISSION, Petitioner,

vs.

MOBILE GAS SERVICE CORPORATION

ORDER ALLOWING CERTIORARI—Filed February 28, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1847-3)